

THE
CAMBRIDGE LAW JOURNAL

Vol. VI.—No. 2. - - - - - - - 1937.

PUBLIC MEETINGS AND PROCESSIONS.

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THE events which gave rise to the Public Order Act, 1936,¹ and the debates in Parliament² on that subject have drawn attention to the uncertainty concerning the law of public meetings and processions. This uncertainty is due in part to the fact that there is only a limited number of cases directly in point, some of which have not been reported in a satisfactory manner, and in part to an over-simplification in the books of what is an exceedingly complicated matter.

Although public meetings and public processions are usually discussed as if they were covered by the same body of legal principles, they will be dealt with in this paper entirely separately, for it may be suggested that some of the confusion in the law is due to the fact that the distinction between the two has not been sufficiently marked. Thus Dicey in his famous chapter on 'The Right of Public Meeting'³ deals with the two separate problems as if they were a single one. 'A has a right', he says, 'to walk down the High Street or to go on to a common. B has the same right. C, D and all their friends have the same right to go there also. In other words, A, B, C and D, and ten thousand such, have a right to hold a public meeting.'⁴ This, however, is not as obvious as it sounds: because A, B and C have a right to walk down the High Street it does not follow 'in

¹ 1 Edw. 8 & 1 Geo. 6, c. 6.

² See the interesting speech by Mr. K. W. M. Pickthorn, M.P., on the second reading of the Public Order Bill, reported in *Parliamentary Debates, House of Commons*, 1936, vol. 317, col. 1379.

³ *Law of the Constitution*, 8th ed., chap. vii.

⁴ At p. 267.

other words' that they have a legal right to hold a public meeting. In fact, as we hope to show, the law on these two subjects is quite distinct. It is interesting, in this connexion, to note that *Beatty v. Gillbanks*,⁵ which Dicey cites as the leading case on the law of public meetings, was not directly concerned with this question at all as the appellants, who were leading a procession through the streets, intended to hold their meeting on private premises.

In considering this branch of law it is also important to distinguish between public meetings held on a highway or in a common or a park, and a meeting which, although open to the general public, is held on private land. Only the former will be considered here.⁶

Public Meetings.

It is convenient to begin this discussion with a statement of the general principle which is the foundation of this branch of the law. What are the rights of the public in relation to the highway? Every student of the law of torts knows that 'the easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel', and that, 'if a person uses the soil of the highway for any purpose other than that in respect of which the dedication was made and the easement acquired, he is a trespasser.'⁷ If the highway is used for any purpose other than travel a trespass is committed even though no one is obstructed and no injury is done. It is immaterial in this connexion whether the act constitutes a nuisance or not. Perhaps the best illustration of this can be found in *Hickman v. Maisey*⁸; in this case it was held that a racing tout, who walked up and down a highway for the purpose of watching horses which were being trained in an adjoining field, committed a trespass against the owner of the land on which the highway was situated even though his act obviously was in no way injurious to the owner or an interference with the use of the highway. Of course this rule must be interpreted in a reasonable manner, for, as A. L. Smith L.J. said: 'If a man, while using

⁵ (1882) 9 Q. B. D. 308.

⁶ The law relating to meetings held on private premises is discussed in 1936, 6 Cambridge Law Journal 22.

⁷ *Harrison v. Duke of Rutland* [1893] 1 Q. B. 142, per Lopes L.J. at p. 154. Lord Esher M.R. said at p. 146: 'So, if a man goes on to part of a highway, the soil of which belongs to the owner of the adjoining land, not for the purpose of using such part of the highway as a highway, but only for some other purpose, "lawful or unlawful"—to use the words of Crompton, J., in the same case (*R. v. Pratt*, 4 E. & B. 860)—he is in so doing committing a trespass against the owner of the soil.'

⁸ [1900] 1 Q. B. 752.

a highway for passage, sat down for a time to rest himself by the side of the road, to call that a trespass would be unreasonable. Similarly . . . if a man took a sketch from a highway, I would say no reasonable man would treat that as an act of trespass.’⁹ What acts may be considered to be included in the right to pass and repass need not concern us here, for it is obvious that a public meeting cannot be one of them. It follows that a public meeting is always a trespass against the person in whom the property in the highway is vested unless he has expressly or tacitly licensed the holding of such a meeting.

This brings us to the first doubtful question, In whom is the right to the surface of the highway vested for this purpose in urban areas? The Public Health Act, 1875, s. 149,¹⁰ vests streets repairable by the inhabitants at large within urban areas in the urban authority. It has been said that under this statute ‘the authority becomes actual owner of the street itself and of so much of the air above and of the soil below as is necessary for the ordinary user of the street as a street’.¹¹ In *Tunbridge Wells Corporation v. Baird*¹² Lord Halsbury L.C. explained the rationale of the statute as follows: ‘That the street should be vested in them as well as under their control may be, I suppose, explained by the idea that, as James L.J. points out, it was necessary to give, in a certain sense, a right of property in order to give efficient control over the streets.’ In urban areas, therefore, an unlicensed meeting on one of the public streets would seem to be a trespass against the urban authority¹³; whether it is also a trespass against the adjoining landowners does not concern us here. The urban authority, it would seem, may therefore ‘by legal process interfere to prevent the holding of such a meeting.’¹⁴

If our assumption that an unlicensed meeting on the highway is a trespass against the urban authorities is correct, then the next question is, What steps can they take to prevent such a trespass? There seems to be only one reported case in which this question was raised. In *Llandudno Urban District Council v. Woods*,¹⁵ the defendant, a clergyman, who was more enthusiastic than tactful, insisted on holding anti-Ritualistic meetings on the

⁹ At p. 756.

¹⁰ 38 & 39 Vict. c. 55. County roads are vested in county councils by the Local Government Act, 1885, s. 11, and the Local Government Act, 1929, s. 29.

¹¹ Sir W. E. Hart and W. O. Hart, *An Introduction to the Law of Local Government and Administration*, p. 512.

¹² [1896] A. C. 434, 437.

¹³ See *Llandudno Urban District Council v. Woods* [1899] 2 Ch. 705.

¹⁴ Halsbury, vol. 27—‘Street and Aerial Traffic’ at p. 281.

¹⁵ [1899] 2 Ch. 705.

foreshore which was vested in the plaintiffs under the provisions of the Public Health Act, 1875. The plaintiffs brought an action against him asking for a declaration that he was not entitled to hold meetings on the foreshore, and for an injunction in case a repetition of the trespass was threatened. In his defence the defendant repeated the generally accepted fallacy: 'I claim the right to preach on the seashore as an ordinary highway', but Cozens-Hardy J., in making the declaration, pointed out that there was no such right. He refused, however, to grant an injunction as this was 'a trivial occasion'. But if a serious trespass were threatened, it is clear that urban authorities would be entitled to apply for such an injunction.

As the obtaining of an injunction is a comparatively slow and expensive process, is it possible for the urban authority to take more direct action? An ordinary owner of land may use reasonable physical force either to prevent a trespasser from coming on his land or to expel him after he has come on it. This rule is applicable to a highway as is shown by the case of *Harrison v. Duke of Rutland*¹⁶ in which it was held that the Duke was entitled to use reasonable force in expelling the plaintiff who was a trespasser on the highway. If the surface of the highway is vested in the urban authority, there seems on principle to be no reason why it cannot use reasonable force to prevent such a trespass, just as it can use force to prevent a trespass to its other property, such as the municipal buildings, etc. There does not seem to be, however, a single reported case in which an urban authority has asserted this power; this may be due to the fact that until 1875 the highway remained vested in the adjoining landowners. If the urban authority has this power, then the further question arises, May it call on the police officers to prevent such a trespass? This is a difficult problem which fortunately we need not discuss here, for the legal relations between the police and the local authorities are unusually complicated. Moreover, would a person who obstructed the police under such circumstances be guilty of obstructing them in the execution of their duty under the Prevention of Crimes Amendment Act, 1885, s. 2?¹⁷ If this is answered in the affirmative then, although trespass is only a civil wrong, it would be a criminal offence to obstruct the police when they were taking steps to prevent such a trespass.

A meeting held on the highway, although it may be a trespass, as we have suggested, against the urban authority, is not on that

¹⁶ [1893] 1 Q. B. 142.

¹⁷ 48 & 49 Vict. c. 75.

ground a wrong against the members of the general public. As far as they are concerned, the meeting is a wrong only if it is a nuisance.¹⁸ As the public are entitled to the unobstructed use of the highway for passing and repassing, any meeting which appreciably obstructs the highway would seem to constitute such a nuisance.¹⁹ The test is whether it 'renders the way less commodious than before to the public'.²⁰ The fact that sufficient alternative passage space is left is no defence.²¹ Moreover it is not necessary to prove that any one has been obstructed: the placing of obstructions on a public road or street in a manner calculated to create an obstruction to traffic is an offence, although no person or carriage may have been actually obstructed.²² Nor is it a defence that the obstruction has been licensed by the local authority: the authority has no more right than any other private individual to withdraw any part of the highway from its ordinary use as a highway. Any use of the highway, however reasonable and convenient to the general public it may be, is a nuisance if it interferes with this right of passage.²³ Applying these rules to the special facts of a public meeting in the highway, it would appear that such a meeting, however reasonable and desirable its purpose may be, is a nuisance if it causes any appreciable obstruction, and that it is not necessary to prove that in fact any one has been prevented from passing. The number of such meetings which are not technical nuisances must, therefore, be very limited, even though it may not be the practice to prohibit them. The usual remedy in the case of a nuisance is by indictment, but in places where a sufficient local by-law is in force the nuisance may be dealt with summarily.²⁴ Thus in *Wise v. Dunning*²⁵ it was suggested in the course of the argument that under the by-laws the police could have prevented the meetings on the ground that, as they obstructed the highway, they were a nuisance.

As we have said above, the number of cases on this subject

¹⁸ *Burden v. Rigler* [1911] 1 K. B. 337.

¹⁹ *R. v. Bartholomew* [1908] 1 K. B. 554, 561.

²⁰ Hawkins' *Pleas of the Crown*, 8th ed. bk. 1, chap. 32.

²¹ Halsbury, *Hailsham* ed. vol. xvi, *Highways*, p. 355: 'It is no defence to show that . . . though a part of the highway actually used by passengers is obstructed, sufficient available space is left.'

²² In *Gill v. Carson and Nield* [1917] 2 K. B. 674, 677 Viscount Reading C.J. said: 'In my judgment it is not necessary to prove that a person has been actually obstructed. It is quite sufficient to prove circumstances from which the justices can conclude that in the ordinary course persons may be obstructed, and that the actual use of the road was calculated to obstruct even though no person was proved to have been obstructed.'

²³ *R. v. Train* (1862) 2 B. & S. 640.

²⁴ Stone, *Justices' Manual*, 66th ed. 1934, p. 1598.

²⁵ [1902] 1 K. B. 167.

is limited, but the following illustrations may be of interest as showing how persistent is the idea that there is a right to hold public meetings on a highway.

In *Homer v. Cadman*²⁶ the appellant, who had addressed a crowd from a chair placed in the highway, was convicted under 3 & 4 Will. 4, c. 50, s. 72, of wilfully obstructing the free passage of such highway. In rejecting the claim that there was a right to hold such a meeting, Smith J. said: 'The appellant was only entitled to use the highway in an authorized manner, that is, to pass over it to and fro.'

In *Bailey v. Williamson*²⁷ the question whether there was a common-law right to hold public meetings in Hyde Park was considered. In rejecting this claim Cockburn C.J. made the interesting comment that 'the habit of using the metropolitan parks for other purposes than those of recreation and exercise is of modern growth'.

A more striking case was *De Morgan v. Metropolitan Board of Works*.²⁸ Although there is a widespread belief that the general public has a right to hold meetings on a common, the Queen's Bench Division held that no such right was known to the law. When pressed with the argument that such meetings were always permitted, Lush J. replied that 'such uses did not constitute a right or prove anything more than an excused or licensed trespass'.

Perhaps the two most frequently cited cases on this subject are *R. v. Cunninghame Graham*²⁹ and *Ex p. Lewis*.³⁰ The Commissioner of Police in exercise of the powers vested in him under the Metropolitan Police Act, 1839,³¹ had issued an order that 'no organized procession shall be allowed to approach Trafalgar Square on Sunday the 13th inst.' It was argued that he had no power to forbid an orderly meeting, but in the first case Charles J., in charging the jury, said that 'undoubtedly Trafalgar-square has been used from time to time for public meetings. . . . I can find no warrant for telling you that there is a right of public meeting either in Trafalgar-square or any other public thoroughfare.'³² In the second case Wills J., in upholding the Commissioner's

²⁶ (1888) 16 Cox C. C. 51.

²⁷ (1873) L. R. 8 Q. B. 118.

²⁸ (1880) 5 Q. B. D. 155, 157.

²⁹ 16 Cox C. C. 420.

³⁰ (1888) 21 Q. B. D. 191.

³¹ 2 & 3 Vict. c. 47.

³² 16 Cox at p. 429. He also said: 'So far as I know the law of England, the use of public thoroughfares is for people to pass and repass along them. That is the purpose for which they are, as we say, dedicated by the owner of them to the use of the public, and they are not dedicated to the public use for any other purpose.'

right to forbid the meeting, said: 'There has been no difficulty experienced in the past, and we anticipate none in the future, when the only and legitimate object is public discussion, and no ulterior injurious results are likely to happen. Things are done every day, in every part of the kingdom, without let or hindrance, which there is not and cannot be a legal right to do, and not unfrequently are submitted to with a good grace because they are in their nature incapable, by whatever amount of user, of growing into a right.'³³

In 1911 the Queen's Bench Division decided the case of *Burden v. Rigler*³⁴ which has led to some misconception. The facts can be stated shortly. The appellant, who had been conducting a public meeting on the highway, preferred an information under the Public Meeting Act, 1908,³⁵ against the respondents who had persistently interrupted his meeting. The justices dismissed the information on the ground that the meeting, being held on the highway, was not a lawful one. On appeal the Divisional Court held that a meeting on a highway was not *ipso facto* unlawful, and they remitted the case. As the evidence showed that the urban authorities had tacitly licensed the meeting, it obviously could not be a trespass against them. The Court did not have before it, nor did it discuss the question whether such a meeting would have been unlawful as against the urban authority if it had forbidden the meeting. On the other hand, no evidence had been given that the meeting had caused any appreciable obstruction in the highway: there was, therefore, no proof that a nuisance had been caused. It follows that this case in no way conflicts with the earlier cases, and that no right to hold a meeting on the highway can be based on it. The case has, however, been sometimes referred to as if it had established a general principle that the only meetings on a highway which are unlawful are those which cause a material obstruction. It is true that the headnote is stated in very wide terms, but Lord Alverstone C.J.'s judgment shows that he did not intend to lay down any such broad principle. He was merely concerned to determine what constituted a lawful meeting under the provisions of the Public Meeting Act, 1908.

The much-discussed recent case of *Duncan v. Jones*³⁶ does

³³ 21 Q. B. D. at p. 197. He added on p. 198: '[The arguments] have not only failed to convince us that there is any right to hold public meetings in Trafalgar Square, but have gone far to establish that the Commissioners of Works have a right to say whether or not it shall be so used.'

³⁴ [1911] 1 K. B. 337.

³⁵ 8 Edw. 7, c. 66.

³⁶ [1936] 1 K. B. 218.

not really concern us here, but it, also, may give rise to misapprehension in the future.

Mrs. Duncan had placed a box in a public street, from which she intended to deliver an address. It was not alleged that there was any actual obstruction of the highway save in the sense of the obstruction necessarily caused by the box and the presence of the people surrounding it. As the police were afraid that a breach of the peace might result if the meeting were held, as had occurred some months previously after a similar meeting, they requested Mrs. Duncan to move the meeting to some other place. When she refused to move she was arrested, and later an information was preferred by the respondent, a police officer, against her under the Prevention of Crimes Act, 1871, s. 12,³⁷ as amended by the Prevention of Crimes Amendment Act, 1885, s. 2,³⁸ alleging that she did unlawfully and wilfully obstruct the respondent when in the execution of his duty. She was convicted, and on appeal the Divisional Court upheld the conviction. The Court decided the case on the ground that if a police officer reasonably apprehends that the action of any person may result in a breach of the peace, then it is his duty to prevent that action. This gives rise to the interesting question whether the police may prevent A from performing a lawful act because they apprehend that B may thereupon cause a breach of the peace, but this need not be discussed here, for it is a problem of general application and does not relate solely to the law of public meetings which we are considering.³⁹

For our purpose it is important to emphasize that the only point in the case concerned a possible breach of the peace: the question was not raised whether the meeting by obstructing the highway was a nuisance, nor whether it was a trespass as against the urban authorities. Nor did the Court have to consider the question whether the Metropolitan Police have been given the power to prevent meetings which are unlawful on these grounds: the answer to this will depend on the interpretation of the Metropolitan Police Act, 1839, and similar Acts.⁴⁰ This question we need not discuss here, as the only point we wish to make is that such meetings are unlawful either as a trespass

³⁷ 34 & 35 Vict. c. 112.

³⁸ 48 & 49 Vict. c. 75.

³⁹ See on this point letters by the Hon. Cyril Asquith, K.C., in *The Times* newspaper, Nov. 2 and 14, 1936.

⁴⁰ In *Lyons, Sons & Co. v. Gulliver* [1914] 1 Ch. at 651 Phillimore L.J. said: 'They are not entitled, using the highway to stop on the highway and stand still more than a reasonable time. It is an obstruction of the highway for a person to stand in the highway for more than a reasonable time, and the police, at any rate in the metropolis, have a power to move such people on.'

against the urban authority or as a nuisance if they cause an appreciable obstruction. What machinery the law may provide for preventing the holding of such a meeting is a problem of administration and not of legal principle.

It may be said that if every unlicensed public meeting is a trespass as against the person or body in whom the surface of the highway is vested, then this obviously may limit the so-called right of public meeting to the vanishing point. This, however, is not surprising, for, as Dicey has pointed out in a note, 'the law which does not prohibit open-air meetings does not, speaking generally, provide that there shall be spaces where the public can meet in the open air, either for political discussion or for amusement. . . . If A wants to deliver a lecture, to make a speech, or to exhibit a show, he must obtain some room or field which he can legally use for his purpose.'⁴¹ Dicey bases this statement on the principle that 'he must not interfere with the convenience of the public, *i.e.* create a nuisance', but it is here that the misunderstanding has arisen, for, it is submitted, no person has a right to use a highway for a public meeting even though no nuisance is created. Under the law a person can only use the highway for the purpose for which it has been dedicated, *i.e.* to pass and repass, and any other unlicensed use, however desirable it may be from other standpoints, is legally wrongful.

Public Processions.

When we turn to the question of the legality of processions on the highway we find that the problem is a considerably simpler one than in the case of public meetings, for such processions are *prima facie* lawful. As A, B and C have each separately the right to pass and repass on the highway, there is nothing illegal in their doing so in concert, unless their procession is illegal on some other ground. Not all processions are lawful, however, for they may fall within the group of offences known as riot, unlawful assembly, and disturbing the peace, or they may constitute a public nuisance.

It is not necessary to discuss the first group at any length because the problems in them are not peculiar to processions, but are part of the general criminal law. By far the most famous of these cases is *Beatty v. Gillbanks*⁴² in which the appellants were charged with unlawful assembly in 'that they unlawfully and tumultuously assembled, with others, to the disturbance of the

⁴¹ Pp. 498, 499.

⁴² (1882) 9 Q. B. D. 308.

public peace and against the peace of the Queen'. As the evidence showed that the Salvation Army procession was perfectly orderly and contained no provocative elements at the time when it was attacked by a hostile crowd, it is difficult to see on what ground the members of the Salvation Army could be guilty of 'tumultuously assembling'. The judgments of the Divisional Court holding that the appellants could not be so convicted seem to be clearly right on principle, although some doubt has recently been thrown on them.⁴³

It is sometimes forgotten that another Salvation Army case was decided on the same principle by another Court at that time. In *Beaty v. Glenister*,⁴⁴ the appellant, a member of the Salvation Army, played a cornet while marching down the street. A large and hostile crowd made a loud noise which disturbed persons in the vicinity. The appellant was convicted of disturbing the peace, but in the Divisional Court Lord Coleridge C.J. and Cave J. held that playing a cornet did not by itself constitute a breach of the peace, and that the appellant could not be held responsible for the noise made by the crowd.

In considering these two cases it is always necessary to remember that in the first case the appellants were charged with unlawful assembly and in the second with breach of the peace. Whether they could have been convicted if they had been charged with committing a public nuisance is a more difficult problem. As the relation between public processions and public nuisance is the most important question in this branch of the law, it is now necessary to consider it at some length.

Here again it is convenient to begin with the statement of a general principle which affects all highway law. Although *prima facie* everyone has a right to use the highway according to his needs, this is subject to the public right of user of the street. As Lindley M.R. said: 'If the public right of user is, in fact, so obstructed that it cannot be used to the extent which the law requires, then the private right must give way.'⁴⁵ However reasonable it may seem to an individual to exercise his private rights in the street this must yield to the paramount public right, for his rights are only relative and not absolute.

A second general rule, which is frequently forgotten, is that it does not follow because a thing is reasonable when done by one,

⁴³ See *Duncan v. Jones* [1936] 1 K. B. at p. 222.

⁴⁴ (1884) 51 L. T. 304.

⁴⁵ *Att.-Gen. v. Brighton and Hove Co-operative Supply Association* [1900] 1 Ch. 276, 281. Cf. *Jessel M.R. in Original Hartlepool Collieries Co. v. Gibb* (1877) 5 Ch. D. 713, 724: 'You have no right to obstruct a public highway; whether it is useful to yourself or not, that is quite immaterial.'

two or three persons, it necessarily follows that it is reasonable when done by a hundred. Here again a quotation from Lindley M.R.'s judgment may be apposite. 'It is always', he says, 'a question of degree. It may be asked, What is the difference between one cart and two, and so on? You cannot draw the line in that way. Nothing is more common in life than to be unable to draw the line between two things. Who can draw the line between plants and animals? And yet, who has any difficulty in saying that an oak-tree is a plant and not an animal?'⁴⁶

These two principles give us a starting point from which to consider the law relating to public processions. The first leads us to the conclusion that the reasonableness of a procession must be judged primarily from the standpoint of the interest of the public and not from that of the members of the procession, and the second suggests that because a school crocodile walking down the High Street does not constitute a public nuisance it does not follow that the same must be said of a parade of a thousand men.

As the public interest is paramount, it is sometimes suggested that, on the analogy of a public meeting, any procession which causes an appreciable obstruction to the highway must be a public nuisance. This, however, is not so. As a public meeting is not one of the uses for which the highway has been dedicated, it is a nuisance if it appreciably obstructs the road. It is no defence to show that sufficient available space is left if a part of the highway actually used by passengers is obstructed.⁴⁷ But, and this is most important, in the case of a procession the test is whether in all the circumstances such a procession is a reasonable user of the highway, and not merely whether it causes an obstruction. Thus, to take an obvious illustration, the temporary crowding in a street occasioned by people going to a circus or leaving it is not a nuisance, for if such a temporary obstruction were not permitted then no popular show could ever be held.⁴⁸

Strange to say there is no English case in which the legality of processions has been considered at any length. We must, therefore, turn to Ireland for our only leading case, *Lowdens v. Keaveney*,⁴⁹ which was decided as long ago as 1903. Lowdens was a member of a band which played partisan tunes while marching down a street in Belfast. A crowd of over 400 collected and obstructed foot and carriage passengers. Although warned by the police, the band insisted on continuing its march.

⁴⁶ [1900] 1 Ch. at p. 282.

⁴⁷ *Homer v. Cadman*, 16 Cox C. C. 51.

⁴⁸ *Inchbald v. Robinson* (1868-9) 4 Ch. 388.

⁴⁹ [1903] 2 I. R. 82.

Lowdens was charged that under 14 & 15 Vict. c. 92, s. 13 (3), he did wilfully prevent and interrupt the free passage of persons and carriages in a public street. He was convicted by the magistrates on the ground that the procession had caused a material obstruction. On appeal, the Divisional Court held that the conviction must be quashed as the magistrates had not considered the essential question whether the procession was a reasonable one. Lord O'Brien L.C.J. began his judgment by giving various instances, such as funerals, civic pageants and trades processions, which showed that taking part in a procession which caused an obstruction was not enough to create liability. There must, therefore, be something more. 'What more must there be? What other condition is necessary? This, namely, [that the user of the street was an unreasonable one.]'⁵⁰ Whether a particular user of the street is reasonable or not is a question of fact. 'The warning of the police', he continues, 'could not merely of itself render the user of the highway unreasonable. It was for the magistrates to determine the question of the reasonableness or unreasonableness of the use of the highway—this essential element they omitted—and, accordingly, the conviction must be quashed.'⁵¹

[Gibson J.'s judgment is particularly interesting. He emphasizes the point that although a procession is *prima facie* legal, thus differing from 'the collection of a stationary crowd', it may nevertheless become a nuisance 'if the right was exercised unreasonably or with reckless disregard of the rights of others'.⁵² In discussing the various elements which a Court ought to take into consideration when determining whether a procession is reasonable or not, he says: 'Occasion, duration of the user, place and hour must be considered; and we must ask was the obstruction trivial, casual, temporary, and without wrongful intent. The matter is very much one of degree, and the whole circumstances must be kept in view before coming to a decision.'⁵³

If this test of reasonableness had been better kept in mind, many of the recent difficulties might have been avoided. In place of the general belief that there is an absolute right to hold a procession, provided that it is not in itself unlawful, we would have realized that this right is only relative—it can only be exercised reasonably. This test will enable us to distinguish

⁵⁰ At p. 87.

⁵¹ At p. 88.

⁵² At p. 90.

⁵³ At p. 90.

between those processions which in fairness ought to be allowed and those which we instinctively feel ought to be prohibited. It is not unreasonable to march innocently through the streets, even though one knows that one may be attacked by a hostile crowd as in *Beatty v. Gillbanks*: it is an entirely different thing to march in a provocative manner through a street whose inhabitants one has denounced in an offensive and insulting manner. Based on some words used by Field J. in his judgment in *Beatty v. Gillbanks* it is sometimes said that the lawfulness of a procession depends upon whether or not a disturbance of the peace is its natural consequence. If the natural consequence of a procession is to create a disturbance of the peace then this, of course, is strong evidence that the procession is unreasonable. This, however, is not the sole test, for a procession may still be a nuisance although, owing to the self-restraint of those who may be provoked by it, no breach of the peace is likely to occur. The proper test to apply to processions is the one laid down by Gibson J. —under all the circumstances of the case is it reasonable for the participants to parade through the streets in the manner they have chosen?

One further point may be discussed here. It is not necessary that the unreasonable obstruction should be caused by the procession itself. It may be a nuisance because it attracts onlookers to an unreasonable extent. This rule is part of the general law of nuisance, and is not peculiar to public processions. It is no defence that the crowd came to watch of its own accord. Perhaps the clearest statement of the law is that of Romer J. in *Bellamy v. Wells*⁵⁴: 'On his behalf it was said that he had not invited the crowd, and did not desire its presence. This is true. But the question appears to me to turn upon this—whether the collection of the crowd under the circumstances was not the probable consequence of the defendant's acts, for, if it was, then he is answerable, whatever may have been his object or desire.' Here again the question is one of degree. A shopkeeper dresses his windows so attractively that some of the passers-by stop for a moment to look at them. No one would say that this constituted a nuisance to the highway, but if the shopkeeper places in his window caricatures and other prints which are of such a nature as to collect a crowd, then he is liable.⁵⁵ Similarly a small casual procession whose 'attraction arises in the ordinary course of lawful locomotion', in Gibson J.'s words, is different in degree from a procession which has been advertised in the press for

⁵⁴ 7 T. L. R. 135, 136.

⁵⁵ *R. v. Carlisle*, 6 Car. & P. 636.

the purpose of attracting a crowd. Here again, the sound common-law test of reasonableness must be applied.

In conclusion it may be pointed out that this brief summary does not pretend to be a complete statement of one of the most difficult and disputed branches of the law. Even so limited, some of the suggestions made in it are advanced with considerable hesitation as there are so few authoritative precedents on which to base a conclusion. Its primary purpose is to emphasize the distinction between public meetings and public processions, and to suggest that there is no right to hold a meeting in the highway in the sense in which there is a right to take part in a procession.⁵⁶ This distinction is a fundamental one, for, although a procession is *prima facie* lawful, there is no such rule in the case of a meeting. But even in the case of a procession the right is not an absolute one—the right is only to use the highway in a reasonable manner, and this depends on the facts of each particular case.

⁵⁶ In Halsbury: Hailsham ed. vol. xvi, p. 362—'Highways'—it is said that it is a nuisance, 'to organise or take part in a procession or meeting which naturally results in an obstruction and is an unreasonable use of the highway.' Here processions and meetings are treated as if they were covered by the same rules, but, as we have suggested, there is a radical difference between them. A reasonable procession is not a nuisance even though it may naturally result in an obstruction, while a meeting which causes an appreciable obstruction is a nuisance, however reasonable it may be from other points of view.

POLICE POWERS AND PUBLIC MEETINGS.

E. C. S. WADE.

A PART from the passage through Parliament at the end of last year of the Public Order Act, the Courts have in the past few years interpreted police powers on several occasions in the direction of restricting liberty. No excuse is therefore required for examining once again in this Journal a topic, one aspect of which was discussed in the last number. The case of *Elias v. Pasmore*¹ [1934] 2 K. B. 164 raised important questions as to the right of the police to search premises in the course of making an arrest on a warrant. That case recognized for the first time the validity on such an occasion of a search, which resulted in the discovery of documents (not being documents in the possession of the person named in the warrant) containing evidence of an offence committed by any person, even though the search and seizure were illegal as regards other documents discovered on that occasion. This protection for police action only extends to the actual documents which are evidence of the commission of a crime; but it matters not that the crime is one alleged to have been committed by some one other than the person in the course of arresting whom the search is being made.

In the Cambridge Law Journal for 1936, Professor Goodhart, under the sub-title of 'A Constitutional Innovation', drew attention to the peculiar interest and importance of *Thomas v. Sawkins* [1935] 2 K. B. 249. That case, contrary to the opinion previously held by the Home Office,² established that the police are entitled to be present at a meeting which is advertised as open to the public and is held on private premises hired for the occasion, if they have reasonable grounds for believing that, but for their presence, seditious speeches would be made and incitements to violence and breaches of the peace would occur. Police officers, on the authority of this case, are enabled, in the execution of their duty, to enter and remain on the premises. Nor need their apprehensions relate to breaches of the peace; the prevention of the commission of any suspected offence is sufficient. The Court

¹ 'Police Search' by the same author. See 50 L. Q. R. pp. 354—367.

² Parliamentary Debates, 1933-34, House of Commons, vol. 290, col. 1968.

seemed to draw no distinction, as Professor Goodhart points out, between the duty of a police constable to prevent a breach of the peace³ and the power of a magistrate, who is, of course, under a similar duty, to bind over persons to be of good behaviour in order to prevent a breach of the peace—a power which is not confined to cases where persons have been put in bodily fear, but covers also acts which do not constitute what are usually known as breaches of the peace, and, indeed, applies to misbehaviour in general. A recent example of the latter type of jurisdiction is to be seen in *The King v. Sandbach, Ex p. Williams* [1935] 2 K. B. 192, where a Divisional Court upheld the decision of a Metropolitan magistrate who had bound over a person charged with obstructing the police in the execution of their duty. His offence consisted of giving warning to street bookmakers of the approach of the police and frequent fines for this offence in the past had acted as no deterrent. But it is one thing for a judge by a judicial process to prevent the repetition of an offence; it is quite a different matter for a ministerial officer, such as a policeman, without any statutory authority, to claim similar power. Be that as it may, the police now exercise under the authority of the Common Law a right to enter upon private property in the circumstances stated, and there appears to be nothing in the case of *Thomas v. Sawkins* to restrict this right to occasions when meetings advertised as open to the public are being held. Reasonable grounds for believing that any offence is likely to be committed are sufficient. Clearly such a power is capable of abuse and Professor Goodhart makes the interesting suggestion that public halls should be licensed for meetings and police supervision made a term of the licence, thus by inference requiring legislation overruling *Thomas v. Sawkins* so as to prevent police entry upon private property, apart from the holding of meetings and the many other cases where entry is already authorized by statute.

We mention these cases at some length in order to emphasize the wide powers now possessed by the police so long as these decisions stand. It is not perhaps surprising then to find a Divisional Court in 1935 willing even to turn the flank of *Beatty v. Gillbanks* (1882) 9 Q. B. D. 308 by recognizing a new power of the police to prevent meetings being held in public places (highways and streets) in a case where no allegation of obstruc-

³ For a definition of what constitutes a breach of the peace, see Hailsham, *Laws of England*, vol. ix, art. 476. The following are examples: An affray (fight in a public place), an assembly for fighting in a private place, a duel, a challenge to a duel.

tion to the highway, nor of disorder of any kind had arisen. *Duncan v. Jones* [1936] 1 K. B. 218 is dismissed in a short note in 52 L. Q. R. pp. 158-9 as following *Wise v. Dunning* rather than *Beatty v. Gillbanks*. In the former case the law recognized that a breach of the peace might be the natural consequence of insulting or abusive language or conduct in itself illegal, while the latter case permitted the reasonable and decent expression of opinion, even when it exposed the speaker to attack from a body coming from outside to interfere with his own meeting. But it is submitted that *Duncan v. Jones* is more closely related to *Beatty v. Gillbanks*. The facts were as follows:—

The appellant Duncan, a woman speaker, was told by Jones, an inspector of police, who was present at the proposed place of meeting, that she could not hold a meeting there in N. Street, but could hold it at D. Street, 175 yards away. She thereupon mounted a box saying, 'I am going to hold it', was taken into custody without resistance on her part and later charged with and convicted of obstructing the police officer in the execution of his duty. Mrs. Duncan had held a meeting some fourteen months previously at the same spot which was opposite a training centre for the unemployed. The previous meeting had been followed on the same day by a disturbance inside the training centre which the superintendent of the centre attributed to the meeting. In the intervening months Mrs. Duncan had made several attempts to hold other meetings at the same spot. It was not, however, alleged that on this occasion she caused an obstruction or that she or any of the persons at the meeting had either committed, incited or provoked any breach of the peace. The appeal to quarter sessions was dismissed and a case was stated to the Divisional Court as to whether there was evidence on which quarter sessions could form the opinion upon which the conviction of obstructing the police officer in the execution of his duty could be upheld. Quarter sessions had found:—

'(1) that in fact (if it be material) the appellant must have known of the probable consequences of her holding the meeting—namely, a disturbance and possibly a breach of the peace—and was not unwilling that such consequences should ensue; (2) that in fact the respondent reasonably apprehended a breach of the peace; (3) that in law it thereupon became his duty to prevent the holding of the meeting; and (4) that in fact, by attempting to hold the meeting, the appellant obstructed the respondent when in the execution of his duty.'

Now the point at issue is whether the police inspector had

any duty to prevent the meeting. If he had no such duty, he could not complain of being obstructed in doing that which it was not his duty to do, and he is in the same position as the over zealous policeman whose action was disapproved in *Beatty v. Gillbanks*, when he arrested the Salvationists because he feared unlawful opposition from another body. No breach of the peace, actual or contemplated as occurring by reason of the present meeting, was in question. Indeed the police suggested a place near by for holding the meeting. What was feared was a repetition of a disturbance inside the training centre, such as had followed the appellant's meeting held outside fourteen months earlier. The police inspector based his fears upon the opinion of the official in charge of the centre, whose apprehensions would certainly have been material, had the case been one involving a charge of unlawful assembly. But no such charge was in issue, though presumably it would have been brought had there been any grounds for doing so. It is true that it was found as a fact that the appellant must have known of the probable consequences of her holding the meeting, namely, a disturbance, and possibly a breach of the peace, and *was not unwilling (sic)* that such consequences should ensue. But this is equally true of the Salvationists in *Beatty v. Gillbanks*, or, for example, a Conservative speaker who holds an election meeting in a Communist district where his previous attempts to hold meetings have been broken up in disorder. Both are prepared to risk disturbances which it is the duty of the police to prevent, in the last resort by dispersing the meeting. But Mrs. Duncan neither caused nor apprehended disorder at her meeting. It would thus appear that the Common Law of England, which rightly penalizes the speaker who persists in insulting language and behaviour (*Wise v. Dunning*), has ceased to protect the speaker who merely desires to give expression to his opinions without causing any obstruction or committing, inciting or provoking any breach of the peace.⁴

Lord Hewart C.J. in the present case was careful to point out that whatever had been established in *Beatty v. Gillbanks* was not in question here, as there was no attempt to prohibit the meeting on the ground of exciting unlawful opposition, and Humphreys J. did not regard the case as one of unlawful assembly. But it is now dangerous for public speakers to rely on *Beatty v. Gillbanks* in the face of *Duncan v. Jones* which makes the apprehension of a policeman, provided it is reasonable,

⁴ [1936] 1 K. B. at p. 219.

the decisive factor as to whether a meeting should be held. The advertised object of this particular meeting was to 'Defend the right of free speech and public meeting'. There is no allegation here of seditious speeches as in *Thomas v. Sawkins*. Nothing could be clearer from the report of the case than that the only allegation supported by evidence was obstruction of the inspector when he interrupted this meeting to prevent the appellant from addressing it. It is only reasonable to infer that had there been any obstruction of the roadway, or breach of the peace committed, incited or provoked, it would have been so alleged by the prosecution. The case thus leaves the law in the unsatisfactory position that it is for the police to decide whether a political party can organize a meeting in a district where its opponents are known to be hostile. The apprehensions of a single policeman based upon the fears of somebody else may apparently be decisive.

Before this decision, the police could intervene to prevent a meeting being held only when a breach of the peace actual or contemplated at the meeting then assembled was in issue, apart from cases of obstruction of the highway and various statutory powers such as those contained in the Seditious Meetings Act, 1817, the Metropolitan Police Act, 1839, s. 52, and the Public Order Act, 1936, s. 5 (which prohibits offensive conduct conducive to breaches of the peace). Since *Duncan v. Jones* the net has closed entirely upon those who from lack of resources, or for other reasons, desire to hold meetings in public places. The result is that there is now no assurance, unless police permission is secured in advance, that a meeting can be held anywhere in a public place, either on the highway or adjoining land, or other place to which the public have access. We venture to think that had the police sought a general power of this nature from the Legislature, no House of Commons in the twentieth century would have been willing to grant it.⁵ The Home Office is understood to be satisfied that the powers of the police to deal with disorder at public meetings are sufficient. Both *Thomas v. Sawkins* and *Duncan v. Jones* are certainly powerful weapons in the hands of the Administration. The vagueness of a power increases the discretion of those to whom it is entrusted, and from

⁵ The Public Order Act, 1936, s. 3, gives power to the police to impose conditions upon the holding of processions and in certain circumstances to have them prohibited in a given area for a maximum period of three months. So far as meetings are concerned, the Act prohibits the carrying of offensive weapons (s. 4), offensive conduct (s. 5), and amends the Public Meeting Act, 1908 (s. 6), to enable the chairman to require a constable to take the names of interrupters. Otherwise the police powers as regards meetings are still governed by the Common Law and a few statutory provisions, as cited above.

the point of view of the public, Home Office satisfaction is not necessarily an assurance that all is well with the state of the law. Nor perhaps would it matter much how wide and indefinite were police powers if the Jew-baiter and Communist were the only elements concerned and both equally suffered repression. But there are districts where the advocates of government by constitutional means are unable to obtain a hearing at public meetings through lack of effective police protection and on the other hand instances of police interference with citizens whose only offence is the distribution of pacifist literature. The question is therefore important: Should the powers of the police of this character be ascertainable chiefly by reference to decisions of the Courts,⁶ or should they be detailed with greater precision by statutory definition? From the point of view of both the public and the police there is much to be said for the latter alternative as regards the state of the law disclosed by the three principal cases in this article, none of which is affected by the provisions of the Public Order Act, save as stated in note (5) above. The public is entitled to know the limits of search permissible to the police in making arrests, particularly of a person who at the time is one of many occupiers of a large building, or is the employee of a large organization. From the police point of view constables ought not to be exposed to vexatious actions on account of *bona fide* investigations⁷; in particular the legality or otherwise of their investigation ought not to depend on the discovery of incriminating documents, as in *Elias v. Pasmore*, or the refusal of an occupier of premises, other than the person arrested, to grant them facilities. Again the public ought not to be exposed to the risk of police invasion of private premises merely because a zealous constable *bona fide* suspects that an offence is likely to be committed there. Yet the police may reasonably claim that they cannot prevent disorder at meetings advertised as open to the public unless they have power of entry into private premises. The basis of the decision in *Thomas v. Sawkins* does not restrict the power to the case of meetings; indeed the case has made superfluous many of the statutory requirements of a search warrant granted upon application to a judicial authority.

Two opinions are possible as to whether street meetings should be permitted at all. In general it is unlawful to hold a meeting or to marshal a procession on the highway, since an obstruction is inevitably caused; the police, however, exercise discretion and

⁶ This, in practice, means at the highest the Divisional Court.

⁷ See *Davis v. Lisle* [1936] 2 K. B. 434.

do not usually enforce the law of obstruction (except against motorists leaving cars unattended). But if street meetings are to be prohibited, surely it would be better to say so in general terms of a statute as in the Public Order Act, 1936, s. 3, in relation to processions in certain circumstances, rather than to rely upon so doubtful a decision as *Duncan v. Jones*, granted that some form of prohibition is necessary. Nor need the police as regards meetings generally, and apart from the question of obstruction to the highway by street meetings, have greater power than could be prescribed by enacting the distinction between *Beatty v. Gillbanks* and *Wise v. Dunning*, whereby police interference is authorized where insulting or abusive language takes place, but is not permitted simply on account of expression of opinion in circumstances which may expose the speaker to attack from outside. A police officer should be grateful if he could point to a clear-cut instruction that he was only to stop a meeting if some incident at the meeting itself, whether caused by the speaker and his supporters or by the opposition present at the meeting place, led him to suppose that disorder was inevitable and could not be averted by any other means. What the speaker said short of committing or inciting the commission of a crime should not be, as such, ground for interference. The primary duty of the police is to prevent disorder by arresting those who cause it, and not, except in the last resort, to disperse the meeting. Another matter which requires regulation is the use made of shorthand notes taken down by police officers at meetings. No one would suggest that a statute could remove all obscurities with which the Common Law has surrounded this subject of expression of opinion at meetings. Nevertheless the Public Order Act has shown that it is perfectly feasible to define police powers by statute. It is a matter for regret that, while that measure was used as an opportunity for increasing certain powers of the police not very closely connected with the banning of political uniforms or quasi-military organizations, nothing was done either to clarify the law as to public meetings which is gradually enlarging the discretion of the police or to revise in the light of current notions of political liberty some of the legislation of the eighteenth and early nineteenth centuries which is still occasionally invoked by the Executive.

SINCE THE STATUTE OF WESTMINSTER.

G. G. PHILLIPS.

THE passing of the Statute of Westminster, 1931, marked the end of a chapter in inter-Imperial constitutional relations. It was considered by most that, while old conventions must develop and new ones come into being, the legal problems of the Commonwealth had, as far as the Dominions and the mother-country are concerned, been finally solved. The hope has been expressed¹ that 'the time will soon have passed when the problem of inter-Imperial relations can profitably be discussed as a matter of municipal law'. It is over five years since the passing of the Statute of Westminster and it may not be unprofitable to review briefly inter-Imperial legal constitutional history since the passing of the Statute and to consider how far in the light of it we are justified in regarding as solved the strictly legal problems of inter-Imperial relations.²

It must first be remembered that sections 2 to 6 of the Statute do not become part of the law of Australia, New Zealand or Newfoundland until adopted by the parliaments of these dominions.³ Such adoption has not yet taken place. In so far, therefore, as those sections were necessary for the removal of doubts, those doubts in relation to those three dominions still remain.

Section 2 of the Statute exempts dominions from the restrictive application of the Colonial Laws Validity Act, 1865. Under that Act a dominion law must be held void if repugnant to an Act of the Imperial Parliament extending to the dominion. There are few such Acts still operative but, until adoption of this section of the Statute, the three dominions excluded from its immediate operation cannot, *e.g.*, enact legislation repugnant to the terms of the Merchant Shipping Act, 1894.⁴

Section 3 of the Statute enacts that a dominion parliament

¹ E. C. S. Wade in preface to 2nd edition of Wade and Phillips' Constitutional Law, 1935.

² This article does not touch upon problems of nationality.

³ Statute of Westminster, s. 10.

⁴ Though this particular difficulty could be largely avoided by the adoption of s. 5 of the Statute which, without prejudice to the generality of s. 2 deals specifically with merchant shipping.

has full power to make laws having extra-territorial operation.⁵ The non-adoption of this section is probably of no great practical importance. As stated by the Conference on the Operation of Dominion Legislation,⁶ there existed before the passing of the Statute uncertainty as to the existence and extent of this limitation upon dominion legislative power. Section 3 purports in terms 'to declare and enact that a dominion *has*' power leaving open the question as to the previous position. It would appear from the decision of the Privy Council in *Croft v. Dunphy* [1933] A. C. 156 that apart from the Statute a dominion (and probably also a colony) may enact laws having extra-territorial operation, where such laws are necessary to give effect to enactments which are within the undoubted competence of the dominion. Canada had undoubted power to enact customs laws. To give effect to such laws it was necessary to enact provisions designed to operate beyond a marine league from the coast. Such provisions were held valid.⁷ In this case the Court threw out *obiter* the suggestion that Canadian legislation might possibly be challenged as *ultra vires* on the ground that it was contrary to the principles of international law inasmuch as it must be assumed that the British North America Act did not confer power on the Dominion Parliament to legislate contrary to those principles. This *dictum* seems, however, to conflict with the statement of the same Court in a later case.⁸ 'In truth, Canada is in enjoyment of the full scope of self-government'. Apart altogether from non-adoption of the Statute it should be remembered that the States of Australia are not included in section 3 of the Statute. Criminal law in general is within the powers of the States. The decision in *Croft v. Dunphy* may, therefore, prove of importance in connexion with State legislation.

Section 4 of the Statute provides that no future Act of the Imperial Parliament shall extend to a dominion except at the request and with the consent of that dominion. The non-adoption of this section is of little practical importance. It is no more than an enactment of that which convention already prescribes.

⁵ Canada has by statute, Extra-Territorial Act, 1933, declared that Acts passed before 1931 and necessarily and reasonably so intended shall have extra-territorial effect.

⁶ 1929, Cmd. 3479.

⁷ Mr. Justice Evatt suggests that the test is: "Does the law in question bear upon the peace, order and good government of the dominion either generally or in respect to specific subjects." The British Dominions as Mandatories (Melbourne University Press), 1934.

⁸ *British Coal Corporation and Others v. The King*, [1935] A. C. 500, 520.

Sections 5 and 6 are not of general scope and we can now turn to questions not connected with non-adoption of the Statute. Two cases of the first importance⁹ have been decided with reference to the right of a dominion to abolish appeals to the Privy Council. South Africa and Australia are given by the terms of their constitutions¹⁰ express power to limit the right to appeal. Laws containing such limitations must be reserved for His Majesty's pleasure, but as was stated in 1929⁶ His Majesty's pleasure will be exercised in accordance with the advice of ministers in the dominion concerned. It was the opinion of most that under the terms of the Statute Canada could abolish appeals to the Privy Council from Dominion Courts. In *Nadan v. The King* [1926] A. C. 482 the Privy Council held invalid a section of a Canadian statute abolishing appeals to the Privy Council in criminal cases. A similar section was enacted in 1933 and challenged before the Privy Council in 1935.⁸ It was argued that, though under section 2 of the Statute of Westminster Canada could enact legislation repugnant to the terms of the Judicial Committee Acts of 1833 and 1844, yet the power of the Crown to grant special leave to appeal to the Privy Council was an essential part of the Royal Prerogative which could only be restricted under the express authority of an Act of the Imperial Parliament. No such express authority had, it was argued, been conferred by the Statute of Westminster. The argument was rejected. The Privy Council took the view that the decision in *Nadan v. The King* had been based on two grounds: (a) repugnancy to the Judicial Committee Acts; (b) invalidity of dominion legislation having extra-territorial effect. Both these difficulties had been removed by the Statute. By section 91 of the British North America Act, 1867, the Dominion Parliament has power to make laws for the peace, order and good government of Canada in relation to (*inter alia*) criminal law including criminal procedure. The appeal by special leave is but one element in the general system of appeals in the dominion. What takes place outside Canada is merely ancillary to practical results which take place in Canada. The appeal is an appeal to an Imperial, not a merely British, tribunal. By necessary intendment section 91 of the British North America Act gives to the

⁹ *British Coal Corporation and Others v. The King*, [1935] A. C. 500; *Moore and Others v. Attorney-General for the Irish Free State and Others*, [1935] A. C. 484.

¹⁰ Commonwealth of Australia Act, 1900, Constitution, s. 74; South Africa Act, 1909, s. 106. Reservation is retained on this point by Status of the Union Act, 1934, s. 10, see *infra*.

Dominion of Canada power to prohibit in cases within its jurisdiction the appeal to the King in Council.¹¹

Similar arguments were put forward and rejected in regard to the abolition of appeals from the Irish Free State¹²; but there were further difficulties here inasmuch as the appeal to the Privy Council had been held¹³ to be ensured by the terms of article 2 of the Treaty between Great Britain and Ireland. By the terms of the Treaty¹⁴ the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada, and the law, practice and constitutional usage governing the relationship of the Crown to the Dominion of Canada shall govern its relationship to the Irish Free State. As has been said, it has been held¹⁵ that this article ensured the right to petition for special leave to appeal. The Treaty was given the force of law by the Irish Free State (Agreement) Act, 1922, passed by the Imperial Parliament. An Irish 'House of Parliament' set up by the same Imperial Act sat as a constituent assembly to frame a constitution for the Irish Free State. The Constituent Act passed by the 'House of Parliament' with the Constitution scheduled thereto was scheduled to an Imperial Act, the Irish Free State Constitution Act, 1922. By the terms of the Constituent Act any provision of the Constitution or any amendment thereof is void should it conflict with any of the provisions of the Treaty. By the Constitution (Amendment No. 22) Act, 1933, of the Irish Free State it was made unlawful to petition for special leave to appeal to the Privy Council. It might have been held, as is pointed out by Professor Keith,¹⁵ that inasmuch as by virtue of the Statute of Westminster the Dominion of Canada now has power to abolish appeals by special leave, the Irish Free State possesses in accordance with article 2 of the Treaty the same power as Canada. The Privy Council, however, went farther and held that it is now competent legally (though it may be a breach of the contractual obligations of the Treaty) for the Irish Free State to pass laws which conflict with the terms of the Treaty.

¹¹ It has been pointed out that this argument imputes to the British North America Act a necessary intendment that could never have been contemplated at the time of the passing of the Act. For discussion of this case, see articles cited in n. 17, *infra*.

¹² *Moore and Others v. Att.-Gen. for the Irish Free State and Others*, [1935] A. C. 484.

¹³ *Performing Right Society v. Bray U. D. C.*, [1930] A. C. 377.

¹⁴ Articles of Agreement for a Treaty between Great Britain and Ireland, 1921, Art. 2.

¹⁵ Notes on Imperial Constitutional Law, *Journal of Comparative Legislation and International Law*, XVII, 222.

The Treaty was given the force of law by an Imperial Act. The Statute of Westminster has given to the Irish Free State power to abrogate Imperial Acts. The argument was rejected that the Constitution of the Irish Free State derived its existence from a Constituent Act passed by a Constituent Assembly which went out of existence leaving no authority capable of amending the Constituent Act. The Constitution derived its authority from an Act of the Imperial Parliament.

It is still open to doubt whether the Canadian Provinces can abolish the appeal to the Privy Council in civil cases. Unlike the States of Australia the Provinces are by section 7 of the Statute given the power under section 2 to repeal Imperial Acts in so far as they form part of provincial law, and they are freed from the fetters of the Colonial Laws Validity Act, 1865. They are not, however, given power to pass laws having extra-territorial operation. In favour of the right to abolish appeal it can be argued that by section 92 of the British North America Act the administration of justice including the constitution and maintenance of civil Courts (which also comprises civil procedure) falls within the powers of the Provinces. The reasoning of the Privy Council in regarding a criminal appeal as simply one element in a Canadian proceeding might equally be used in regard to a civil appeal from a Provincial Court. Furthermore, though the silence of the Statute is a powerful argument to the contrary,¹⁶ it might be urged that in accordance with the reasoning of *Croft v. Dunphy* the Provinces may pass legislation to implement their power to control civil justice. The better opinion would, however, seem to be against the right of the Provinces to abolish the appeal. The Judicial Committee Acts of 1833 and 1844 have been described as affirming and regulating the prerogative appeal,¹⁷ not as superseding the prerogative. *Nadan v. The King* has not been disapproved. Had it been intended to give to the Provinces power to abolish appeals they would have been given by the Statute power to legislate

¹⁶ W. P. M. Kennedy, *Essays in Constitutional Law* (Oxford University Press) 172, n. 2.

¹⁷ *British Coal Corporation and Others v. The King*. The remark in *Moore and Others v. The Att.-Gen. for the Irish Free State and Others* that 'the prerogative is *pro tanto* merged in the Statute' would seem to refer only to the Irish Treaty. Vincent C. MacDonald considers that the Judicial Committee took the view that the prerogative was merged in the Statute by the enactment of the Acts of 1933 and 1934 (13 Canadian Bar Review, p. 628); see also Prof. W. P. M. Kennedy, *ibid.* at p. 623; Potter A. Oyler, *ibid.* at p. 616; and W. I. Jennings in 52 L. Q. R. at p. 180. It is, however, submitted that this point was not decided. The Judicial Committee held, it is submitted, that even if the prerogative was not merged in the Statute, the British North America Act by necessary intendment gave power to restrict it.

with extra-territorial effect. The Dominion of Canada could abolish civil appeals from the Supreme Court, but could not abolish appeals from Provincial Courts. Should one Province take action, and not another, a chaotic situation would arise.¹⁸

South Africa has by the Status of the Union Act, 1934, enacted the Statute of Westminster as a Union Act. The Status of the Union Act provides that no Act of the Imperial Parliament shall after 1931 extend to the Union as part of its law unless extended thereto by a Union Act. The executive government of the Union is vested in the King acting upon the advice of Union ministers and may be administered by the King in person or by the Governor-General. By the Royal Executive Functions and Seals Act, 1934, ministers are given power to determine what functions shall be performed by the King in person and what by the Governor-General. As has been pointed out by Professor Keith,¹⁹ this power negatives the possibility of royal objections to courses of action in external matters. It would place the King in a difficult position, should he be compelled personally to declare the neutrality of the Union in a war in which the United Kingdom was engaged.

Reservation has, by the Status of the Union Act, been retained so far as are concerned bills limiting appeals to the Privy Council; the admission of new territories to the Union; and the transfer to the Union of the native Protectorates. The retention of reservation would seem to be of little importance in view of the convention that in relation to Dominion affairs the Crown will act only on the advice of dominion ministers. Professor Keith suggests²⁰ that in relation to such reserved bills the King will still act on the advice of British ministers, but it would seem that such an opinion runs contrary to the accepted convention just referred to. The question of the transfer to the Union under section 151 of the South Africa Act of the native territories of Basutoland, Bechuanaland and Swaziland has been clarified by an understanding reached between the United Kingdom and Union Governments.²¹ Such transfer cannot take place until (a) the inhabitants have been consulted, and (b) the United Kingdom Parliament has been given an opportunity to express its views. The safeguards provided by the Schedule to the South Africa Act are of no value now that the absolute right to disallow Union legislation has disappeared.

¹⁸ Kennedy, *Essays in Constitutional Law*, 155 and 171.

¹⁹ *Juridical Review*, XLVI, No. 2, p. 161.

²⁰ *Juridical Review*, XLVI, No. 2, p. 169.

²¹ *Parliamentary Paper*, Cmd. 4948.

By section 152 of the South Africa Act certain clauses of the Act (the entrenched clauses) can only be altered by a two-thirds majority at a joint sitting of the two Houses of Parliament. These clauses relate to the voting qualification in the Cape (native franchise) and to the equality of the English and Dutch languages. A resolution was passed by the House of Assembly in 1931 which acknowledged that these clauses would be respected both in the spirit and in the letter of the South Africa Act. In 1934 the Speaker said that in his view in order to amend any of the entrenched clauses the procedure laid down in the South Africa Act must be followed. It has been said ²² that it is as yet too early to say whether the Speaker's statement sets out a constitutional convention or a rule of parliamentary procedure. 'The Speaker might thus have stated what is a constitutional convention based upon a sense of public honour. It appears to be a definite and living force in the Constitution, and as such merits cognizance by students of constitutional law.' ²² The prescribed procedure was followed in 1936 when the Representation of the Natives Act which altered the voting qualification in the Cape was passed.

It is left open for any dominion to abolish disallowance under the powers given by the Statute of Westminster. Any necessity for the retention of disallowance has been removed by the passing of the Colonial Stock Act, 1934.²³ Under this Act a Dominion if it wishes its loans to have trustee status in the United Kingdom must pass an Act undertaking to obtain the assent of the United Kingdom Government to any legislation which trespasses upon the rights of colonial stockholders, and must agree to alter any legislation to which the United Kingdom Government takes exception on this ground.

In order to amend the Canadian Constitution there is required an Act of the Imperial Parliament amending the British North America Act. There is similarly required an Act of the Imperial Parliament if it is desired to amend sections 1 to 8 of the Commonwealth of Australia Act which set up the Federation. It is the opinion of most Canadians ²⁴ that such an amending Act can only be passed on the request of the Dominion made with the consent of the Provinces. This opinion is confirmed by the view taken by the Joint Committee of Lords and Commons which was set up to consider Western Australia's petition for secession.

²² Kennedy and Schlosberg, *The Law and Custom of the South African Constitution* (Oxford University Press), 103.

²³ The conditions prescribed by this Act are alternative to acceptance of disallowance under the conditions prescribed under the Colonial Stock Act, 1900.

²⁴ Kennedy, *Essays in Constitutional Law*, p. 147.

The view was expressed that Parliament can only dissolve the Federation on the definite request of the Commonwealth conveying the views of the people of Australia as a whole. In this connexion it may be noted that the request and consent required for the application to Australia of an Imperial Act passed since the Statute of Westminster is by section 9 of the Statute expressed to be the request and consent of the Parliament and Government of the Commonwealth.

The new constitutional position of a Governor-General has not yet been regularized by law. Steps have not yet been taken to free a Governor-General from the legal liabilities of a colonial governor. It would seem clear that a Governor-General should not be held liable for his official acts done on the advice of ministers.²⁵

There remain to be considered certain problems relating to the interpretation of the Statute of Westminster itself. Section 7 of the Statute provides that nothing in the Statute shall be deemed to apply to the amendment of the British North America Acts, 1867 to 1930. Can any future amendments to the British North America Acts be themselves amended without the intervention of the Imperial Parliament? The better opinion is that they cannot.²⁶ By section 4 of the Statute no Act of the Imperial Parliament shall extend to a dominion as part of the law of that dominion except at the request and with the consent of the dominion. Does this mean that the Imperial Parliament can no longer legislate for the Provinces of Canada on matters within the Provincial sphere? Probably such legislation is no longer possible except with the consent and at the request of both the Dominion and the Province.²⁷ Some sentences of Lord Sankey form the best guide to the solution of future problems: 'The Imperial Parliament could as a matter of abstract law repeal or disregard section 4 of the Statute. But that is theory and has no relation to realities. In truth Canada is in enjoyment of the full scope of self-government.'²⁸

NOTE BY DR. E. C. S. WADE.

The above article was written prior to the abdication of King Edward VIII, an event which necessarily involved amendment of the Act of Settlement and therefore called for action by the

²⁵ See Wade & Phillips, *Constitutional Law*, 2nd ed. pp. 435, 436.

²⁶ Kennedy, *op cit.* p. 169.

²⁷ Wade & Phillips, *op. cit.* p. 445.

²⁸ *British Coal Corporation and Others v. The King*, [1935] A. C. 500, 520.

parliaments of the dominions as recognized by the second recital in the preamble of the Statute of Westminster, 1931. This reads as follows:—

‘ And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom.’

Accordingly His Majesty's Declaration of Abdication was communicated to the Governments of the five dominions. Previous to this the dominion Prime Ministers had received from Mr. Baldwin informal intimation of the King's intention to abdicate. At a still earlier stage the United Kingdom's Prime Minister had communicated with the Prime Ministers of all the dominions regarding the proposal for legislation to enable the King to marry without conferring the position of Queen upon his wife. In Mr. Baldwin's own words ‘ inquiries had gone far enough to show that neither in the dominions nor here would there be any prospect of such legislation being accepted ’. Thus the need for legislation was unquestioned and no reliance was placed upon the technical plea that a preamble is not an operative part of a statute.

The Abdication Act itself contained the following words in the preamble:—

‘ And whereas, following upon the communication to His Dominions of His Majesty's said declaration and desire, the Dominion of Canada pursuant to the provisions of section four of the Statute of Westminster, 1931, has requested and consented to the enactment of this Act, and the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa have assented thereto.’

It will be noticed that while section 4¹ of the Statute of Westminster applies both to the Dominion of Canada and the Union of South Africa, only the Dominion expressly requested

¹ ‘ No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.’

and consented to the enactment of the Abdication Bill. The Union merely assented, as did the Commonwealth of Australia and the Dominion of New Zealand, neither of whom, unlike the Union, has adopted the main operative sections—including section 4—of the Statute of Westminster, though the preamble, for what its legal effect is worth, is binding upon them. That the Union should take up this attitude is consistent with section 2 of the Status of the Union Act, 1934, which requires the enactment of Imperial legislation by the Union Parliament, even when the language of United Kingdom statutes is adopted. Accordingly the Union Parliament has now passed its own Act recognizing the change of Sovereign, operative only as part of the law of the Union, though having extra-territorial validity for Union purposes. It is interesting to notice that the abdication is recognized as taking effect from December 10, and not from December 11, the date of the Royal Assent to the United Kingdom measure. The Act, moreover, bears the Assent of King George VI and not of King Edward VIII. It would seem then that prior to this enactment by the Union Parliament the position was that the Instrument of Abdication was accepted by the Union Government as an act of Edward VIII who thereupon ceased to be King, but the legal status of his successor awaited for some weeks legislation to amend the Act of Settlement as regards its application to the Union.² It may be observed that Canada has subsequently passed an Act to give effect to the alteration in succession to the Throne, notwithstanding her request and consent to the United Kingdom Statute.

The two dominions who have not adopted section 4 of the Statute of Westminster merely assented to the United Kingdom Act. Apparently they did not wish to assert their constitutional right recognized in the preamble of the Statute of Westminster to legislate on this topic, though in the case of Australia the Commonwealth Parliament met and passed resolutions contemporaneously with the enactment of the Abdication Act at Westminster. The Irish Free State is not mentioned in the United Kingdom Abdication Act. Its Government did not assent to the legislation, but acting independently, it is believed, of both the United Kingdom Government and the Governments in the other dominions, passed two measures³ in the Dáil Éireann whereby (i) the Crown is eliminated as an instrument for internal government and the office of Governor-General is abolished;

² But see s. 5 of the Status of the Union Act, 1934.

³ The Constitution (Amendment) No. 27 Act, 1936, and the Executive Powers (External Relations) Act, 1936; the latter recognizes the change of Sovereign.

(ii) the Crown is recognized for external purposes in the person of King George VI so long as the British Commonwealth of Nations continues in its present form.

Thus the hope which I expressed in 1935 that inter-imperial relations might soon cease to be a matter of municipal law has remained unfulfilled in an entirely unforeseen direction. The legalism involved by accepting as strict law the preamble to the Statute of Westminster regarding succession to the throne undoubtedly added to the embarrassment of King Edward VIII, his Successor and His Majesty's Governments throughout the Commonwealth in the difficult decisions of December, 1936.

The recent Regency Act contains no reference to its operation in the dominions. It does not alter the succession to the throne; therefore the dominions are free to adopt it or not as and when they please by their own enactments.

COMMON LAW MISDEMEANORS.

R. M. JACKSON.

THE recognition of the misdemeanor of Public Mischief has raised the whole issue of whether it is desirable that the judiciary should be in a position to extend the criminal law.¹ The abortive Draft Criminal Code, section 5, provided that all offences should be prosecuted either under the Code or under some other statute, and not at common law. Fitzjames Stephen strongly supported this proposal.² The opposing view is that no legislation can foresee all the mischievous acts that may occur, and that it is therefore undesirable to take away from the judges their power of extending common law offences. Any full discussion of this problem requires some consideration of the part played by the judges in building up our criminal law. The purpose of this paper is to examine the main lines of judicial activity in this field.

The legal history that forms part of the work of law students to-day is generally the history of the Courts and the history of the civil law. The history of particular criminal offences receives little attention³; this is my excuse for setting out some general comments. A useful starting-point is Blackstone's Commentaries, vol. IV, for this gives us a masterly summary of the state of our criminal law in the middle of the eighteenth century. Two characteristics stand out: first, the severity of our law, and second, the great importance of statutes. In criminal law the part played by statute was far and away greater than in any other branch of the law, and since Blackstone all the great changes in criminal law have been made by legislation. The scope of common law crimes in Blackstone's day was still large, such offences falling into two main classes. *First*, there were old common law felonies, such as homicide, larceny and burglary,

¹ 49 L. Q. R. (1933), editorial comment at p. 153, and article by Dr. Stallybrass at p. 183.

² Stephen, *History of the Criminal Law*, iii, 358 *et seq.*

³ Kenny, *Outlines of Criminal Law*, contains many references to the history of offences. It is significant that Stephen, *History of the Criminal Law*, 1883, has never been republished.

where the Courts 'developed and filled up the somewhat bare outlines of the medieval common law'.⁴ If larceny is taken as an example, the position for Blackstone⁵ was that the definition of stealing was common law, but by the 'subtilty in the legal notions of our ancestors' the kinds of property capable of being stolen had been so restricted that many statutes had been passed to widen the offence.⁶ *Second*, there was a group of offences representing Star Chamber doctrines taken over by the common law Courts.⁷ Among the more important of these were violent wrong-doing (including riot and similar offences),⁸ offences against the administration of justice⁹ and libel,¹⁰ all of which had been incorporated into the common law when Blackstone wrote. His treatment of conspiracy¹¹ is limited to the old common law sense of conspiring to indict a man falsely. This is peculiar, since it had been well established since the late seventeenth century that a conspiracy to commit any crime or other wrong was indictable¹²; the explanation is doubtless that Blackstone relied on Hawkins¹³ and he was not up to date in this respect.

In a sense, of course, the incorporation of Star Chamber practice into the common law was a process of creation by the judges of new offences at common law. But apart from that, to what extent have the judges created new offences since the Restoration? Here a somewhat arbitrary distinction has to be drawn between judicial extension of existing law and new offences which do not appear to be warranted by precedent. Perhaps the most important example of the former is constructive treason. The law of treason was statutory, and Hale¹⁴ considered it great wisdom to prevent the judges from expanding the meaning of treason, but the eighteenth century produced rules of constructive treason¹⁵ which virtually amounted to the creation of new offences. When 'imagining the king's *death*' included acts which might harm the king or lead to his imprisonment, or a

⁴ Holdsworth, *History of English Law*, viii, 302 *et seq.*

⁵ Bl. Comm. iv, 229 *et seq.*

⁶ Stephen, *op. cit.* iii, 144 *et seq.*

⁷ Holdsworth, *op. cit.* v, 197 *et seq.*

⁸ Bl. Comm. iv, Chapters 11 and 15.

⁹ Bl. Comm. iv, Chapter 10.

¹⁰ Bl. Comm. iv, 150.

¹¹ Bl. Comm. iv, 136.

¹² Holdsworth, *op. cit.* viii, 381, where the relevant authority is cited.

¹³ Hawkins, *Pleas of the Crown* (1716) i, Chapter 72. Hale, *Pleas of the Crown*, does not discuss conspiracy.

¹⁴ Hale, P. C. i, 259. In *Pine's Case* (1628) 3 Howell's State Trials, 359 at 368, the judges said that uttering words could not be treason 'unless it were by some particular statute'.

¹⁵ Holdsworth, *op. cit.* viii, 307 *et seq.*

rebellion in Canada,¹⁶ there is some difficulty in holding that the Courts were merely interpreting statute. In the same way, the extension of libel to cover seditious libel in the eighteenth century¹⁷ and the extension of conspiracy to the activities of organized labour¹⁸ can be regarded as new offences.

The offence of grossly scandalous behaviour is difficult to classify. It has been regarded as being derived from the Star Chamber. This view¹⁹ rests on the language used in *R. v. Sedley* in 1664.²⁰ Sir Charles Sedley appeared naked on a balcony in Covent Garden; the Court said that he must know that although there was no longer any Star Chamber the Court is the 'custos morum' of all the king's subjects, and he was accordingly punished.²¹ This reference to the Star Chamber occurs only in the report in *Siderfin*. In *Keble* it appears that Sedley's offence was not only exhibitionism, but also 'throwing down bottles . . . vi et armis among the people of Covent Garden, contra pacem, and to the scandal of the Government'. These reports, both short, make it impossible to say to what extent *Sedley's Case* was regarded as a breach of the peace aggravated by indecency, or whether the indecency was regarded as an independent offence. If the former is the correct analysis, we have here a development of old common law principle. This was of some importance in the creation of the offence of obscene libel. In *R. v. Read* (1708)²² the indictment charged a libel by the publishing of an obscene book. Powell J. said: 'This is for printing bawdy stuff . . . a libel must be against some particular person or persons, or against the Government. . . . There is no law to punish [obscene writings], I wish there were, but we cannot make law.' Holt C.J. agreed that it was no offence. *Sedley's Case* was cited, but Powell J. thought that that case turned on the breach of the peace. The question arose again in 1727, in *R. v. Curl*,²³ and this time the publication of an obscene book was held to be a libel and indictable as such. *Sedley's Case* again came under discussion; at first the Court took the view that Sedley's breach of the peace was the decisive

¹⁶ Stephen, *op. cit.* ii, 274—280. Such offences were made statutory treason in 1795 by 36 Geo. 3, c. 7.

¹⁷ Stephen, *op. cit.* ii, chap. xxiv.

¹⁸ Stephen, *op. cit.* iii, pp. 209 *et seq.*

¹⁹ Professor Sayre, 41 Harvard Law Review (1928) 829, takes this view.

²⁰ 1 *Siderfin* 168, 1 *Keb.* 620. The defendant's name is spelt variously; the correct spelling, used in some reports and in the Dictionary of National Biography, is 'Sedley'.

²¹ 'Pur ceo q̄ il fuit gent' home de trope aunç family' he was merely fined 2,000 marks, imprisoned one week, and had to give security for good conduct for three years.

²² Fort. 98.

²³ 2 Str. 788.

factor, but later they said this was but a small part of his offence. The judges thus evaded the decision in *R. v. Read*²² by re-interpreting *Sedley's Case*, and so created the offence of obscene libel; the Court in 1727 had no difficulty in doing what the Court in 1708 had declared it could not do. Apart from obscene libel, *Sedley's Case* had not been much cited. When in 1809, a man who had taken a bath at Brighton, undressing and dressing on the beach, learned from the judge that 'the necessary tendency of his conduct was to outrage decency, and to corrupt the public morals', it was assumed that this was an offence and no authority was cited.²⁴ When authority was wanted it has been found in treatises containing general words founded upon *Sedley's Case*.²⁵ No authority was cited when it was held in 1788 that 'grave-snatching' to get subjects for anatomical dissection constituted an offence as being an indecent act *contra bonos mores*.²⁶ Stephen J. refused to consider that burning a corpse instead of burying it was in itself a misdemeanor.²⁷

Attempts to commit crimes were punished by the Star Chamber, and it has been thought that this doctrine led to the common law rules,²⁸ but this view cannot be supported. Professor Sayre has shown²⁹ that the modern doctrine dates from *R. v. Scofield* in 1784.³⁰ As late as 1833³¹ it was argued that an attempt to commit a misdemeanor was no offence, and in 1837³² counsel contended that it was no offence to attempt to commit a statutory misdemeanor; both contentions were unsuccessful. The establishment of the rule that an attempt to commit any indictable offence is itself a misdemeanor still left unsettled the question of what constitutes an attempt as opposed to mere preparations; on this question the leading cases begin in the middle of the nineteenth century.³³ The growth of the

²⁴ *R. v. Crunden*, 2 Camp. 89.

²⁵ As in *R. v. Wellard* (1894) 14 Q. B. D. 63, at 67: 'It seems to be established that, speaking generally, whatever openly outrages decency and is injurious to public morals is a misdemeanor at common law', citing Bl. Comm. iv, 65; Hawkins P. C. i, c. 5, s. 4; East P. C. c. 1, s. 1.

²⁶ *R. v. Lynn* (1788) 2 T. R. 733. The indecency is the exhumation; hence religious motives are no defence, although they may mitigate the penalty: *R. v. Sharpe* (1857) Dears. & Bell 160.

²⁷ *R. v. Price* (1884) 12 Q. B. D. 247, at 255. The burning of a corpse may in some cases constitute a nuisance and so be indictable, or it may be indictable as an act done to prevent the holding of an inquest: *R. v. Stephenson* (1884) 13 Q. B. D. 331.

²⁸ Stephen, *op. cit.* ii, 223-4; Holdsworth, *op. cit.* v, 201.

²⁹ 41 Harvard Law Review (1928) p. 821.

³⁰ Cald. 397.

³¹ *R. v. Harris*, 6 Car. & P. 129.

³² *R. v. Roderick*, 7 Car. & P. 795.

³³ Turner, 5 Cambridge Law Journal (1934) p. 230.

rules about attempts was thus a slow process; whilst it was taking place a number of decisions established the criminality of conduct akin to attempts in certain cases. Thus in *R. v. Heath* (1810),³⁴ it was held that being in possession of counterfeit silver with intent to utter it as good, is no offence. From the authority relied on by the prosecution it is clear that the case was regarded as an attempt to utter counterfeit silver, and the prosecution failed because there was no 'act'.³⁵ In *R. v. Fuller* in 1816³⁶ this difficulty was surmounted by indicting for procuring base coin with intent to utter it as good; the necessary 'act' was the 'procuring', and the possession of such coin was treated as evidence that it had been procured. The ideas about attempts which can be seen in *R. v. Heath*³⁴ and *R. v. Fuller*³⁶ have been long exploded; the procuring of base coin with intent to utter it is no more an attempt than is the procuring of a box of matches with intent to commit arson.³⁷ However, the undeveloped idea of attempts begot the independent misdemeanor of procuring base coin with intent to utter it, and this misdemeanor has survived³⁸ as an offence not included within the Coinage Acts. In the case of coining implements, the mere possession of these was treated somewhat as an attempt when the law of attempts was rudimentary,³⁹ and here also the objection that there was no 'act'⁴⁰ was overcome by indicting for procuring such implements for false coining; this was upheld in 1855 although at that date the more developed law of attempts obliged the prosecution to admit that the evidence would not support an indictment for an attempt to coin.⁴¹ The principle of *R. v. Fuller* was also responsible for the proposition that the possession of obscene prints is no offence, but that the procuring of such prints for the purpose of uttering or selling them is a misdemeanor at common law.⁴² The conclusion is that the late development of our law of attempts has left us with several

³⁴ Russ. & Ry. 184. *R. v. Stewart* (1814) Russ. & Ry. 288 is a similar case.

³⁵ 'So long as an act rests in mere intention, it is not punishable by our laws': *R. v. Scofield* (1784) Cald. 397, per Lord Mansfield at 402.

³⁶ Russ. & Ry. 308.

³⁷ Kenny, *Outlines of Criminal Law*, 15th ed. p. 93. A late instance of failure to distinguish between preparations for an offence and an attempt to commit that offence can be found in the language of the judges in *R. v. Chapman* (1849) 2 Car. & K. 846.

³⁸ Russell, *Crimes*, 8th ed., i, p. 362. Since case law is always retrospective it is fair to say that this misdemeanor has survived several demonstrations that its parents never existed.

³⁹ *R. v. Sutton* (1736) Cas. temp. Hard. 370; 2 Str. 1074.

⁴⁰ *R. v. Heath*, *supra*, virtually overrules *R. v. Sutton*. The Coinage Act, 1861, s. 24, now governs this offence.

⁴¹ *R. v. Roberts* (1855) 7 Cox 39; Dears. 539; 25 L. J. M. C. 17.

⁴² *Dugdale v. R.* (1853) Dears. 64; Russell, *Crimes*, ii, p. 1732.

common law misdemeanors historically based on propositions no longer valid; these are sometimes described as cases analogous to attempts.⁴³

The offence of soliciting a person to commit a crime appears to be an offshoot of attempts; the soliciting was regarded as an attempt to commit the crime by the agency of the person solicited. There are early cases dealing with procuring the commission of a crime, but the general rule remained unsettled until *R. v. Higgins* in 1801.⁴⁴ The close connexion with attempts can be seen in the arguments used in this case.

The most recent step in the creation of misdemeanors at common law is, of course, the decision in *R. v. Manley* in 1933⁴⁵; this case has been fully discussed by Dr. Stallybrass⁴⁶ and there is no need for any further examination of the precedents upon which it is based. Indictments for public mischief have now been used in many cases similar to *R. v. Manley* where persons have wasted the time of the police by lodging bogus complaints.^{46a} In September, 1936, the proprietor and the printer of the *Fascist* were tried on charges of seditious libel and public mischief in publishing articles attacking those of the Jewish faith; the prosecution was successful on the counts relating to public mischief.⁴⁷ This case has provoked some discussion, and the question has been asked, What *is* public mischief?⁴⁸ The answer appears to be that public mischief is any conduct that happens to be sufficiently distasteful to the judges.⁴⁹ The punishment for common law misdemeanor is imprisonment without hard labour, there being no limit to the period of imprisonment; the Court may also impose a fine, and recognizances (with or without sureties) to be of good behaviour for any reasonable time.⁵⁰ It should also be remembered that such offences are triable at quarter sessions,⁵¹ and that not all quarter sessions have a chairman with legal qualifications.

A more difficult task is to assess the instances where the judges have failed to extend the common law, for in any matter

⁴³ Russell, *Crimes*, 8th ed., i, p. 149, includes some of these without any indication of their origin.

⁴⁴ 2 East 5.

⁴⁵ [1933] 1 K. B. 529.

⁴⁶ 49 L. Q. R. (1933) p. 183.

^{46a} The Scottish Courts appear to have reached by another route the result of *R. v. Manley*; see *Kerr v. Hill* (1936) *Scots Law Times* 320.

⁴⁷ *The Times* newspaper, September 19 and 22, 1936.

⁴⁸ 82 *Law Journal* (N.S.) p. 310.

⁴⁹ Compare Kenny's observations on conspiracy, *Outlines of Criminal Law*, 15th ed. p. 339.

⁵⁰ Halsbury, *Laws of England*, 2nd ed. vol. ix, pp. 227 *et seq.*

⁵¹ Halsbury, *op. cit.* vol. ix, p. 426.

of discretion a failure to act is as important as action. As a first instance, we can take the offence of obtaining money or goods by false pretences. In a case in 1704,⁵² the defendant had obtained money by falsely representing that he was authorised to collect a debt; this was held to be no offence, since a common law cheat was confined to the use of some physical device, such as false weights or measures. Subsequent cases show no change in common law doctrine,⁵³ and the offence of obtaining money or goods by false pretences was created by the Legislature in 1757.⁵⁴ An equally striking failure of the common law was in the field of fraudulent conversion of property the possession of which had been acquired honestly. The failure of prosecutions because of the rigidity of the common law led to statutes which created the following offences: embezzlement in the modern sense in 1799, fraudulent conversion in 1812, fraudulent pledges by factors in 1827, fraudulent disposition by trustees in 1857, and misappropriation by bailees in 1857.⁵⁵ I do not think that any special explanation can be given of judicial inactivity in these matters. The truth seems to be that in our Courts the mass of precedents that may be cited can be used for opposite purposes: a chaos of precedents may be used to cover timidity or to cover innovation. The general propositions put forward in *R. v. Manley*⁵⁶ are based on such *dicta* as: 'Private justice, moral fitness and public convenience . . . when applied to a new subject, make common law without a precedent.'⁵⁷ If this is correct, why did Parliament have to create so many new offences?

In considering how the English system would work if all offences had to be prosecuted under a criminal code or under statutes, it is worth noting the provisions made in other common law countries. In New Zealand, since 1893, all offences are statutory and no criminal proceeding can lie at common law.⁵⁸ The Indian Penal Code, 1860, s. 2, provides that if an offence falls under any section of the Code, then the definition of the offence and the procedure under it must be under the Code. The Code is thus exhaustive as to all matters that it deals with, and English common law cannot vary, or add to anything under the Code.⁵⁹ The only possibility of common law crime is where

⁵² *R. v. Jones*, 2 Ld. Raym. 1013; 1 Salk. 379; 6 Mod. 105.

⁵³ *R. v. Wheatley* (1761) 1 Black. W. 273; 2 Burr. 1125; and cases there cited.

⁵⁴ 30 Geo. 2, c. 24, s. 1, later 7 & 8 Geo. 4, c. 29, s. 53; Larceny Act, 1861, ss. 88, 89, 90, now Larceny Act, 1916, s. 32.

⁵⁵ Stephen, *op. cit.* iii, 152 *et seq.*

⁵⁶ [1933] 1 K. B. 529.

⁵⁷ *Millar v. Taylor* (1769) 4 Burr. 2303, at 2312.

⁵⁸ 49 L. Q. R. (1933) p. 482.

⁵⁹ *Kari Singh* (1912) 40 Calcutta 433.

English common law was applicable to a territory prior to 1860, and the topic is one on which the Code or other legislation has no provisions. Criminal law in Canada is regulated by the Criminal Code of 1892 and amendments, but this is not exhaustive, for English common law was left in force in Canada except where it is repugnant to the Code or other legislation: section 15 of the Code expressly provides that where an offender is liable to be prosecuted under statute and at common law, he may be prosecuted under either, but is not liable to be punished twice. It appears to be quite competent for the Canadian judiciary to develop a common law misdemeanor such as public mischief. In Australia the survival of English common law leaves this power to the judiciary; the Courts of Victoria and of New South Wales have already followed *R. v. Manley*⁶⁰ on indictments for effecting a public mischief by misleading the police.⁶¹ In the United States of America we have to consider Federal and State jurisdiction. It is well settled that 'the criminal jurisdiction of the United States is wholly statutory'.⁶² In the separate States the criminal law is generally the English common law altered in varying degrees by legislation, and where common law is in force there have been extensions of it analogous to the process that has taken place in England.⁶³ In some States there has been legislation covering the whole field of criminal law; there are no common law offences in Indiana, Iowa, Louisiana, Oregon, New York, and California.⁶⁴ This diversity of practice, and particularly the contrast between New Zealand and Australia, should dispose of any idea that English criminal law necessitates judicial discretion in defining offences.

My conclusion is that the power of the Courts to create new offences has been of undoubted use, but that their activities have been sporadic and extremely unreliable. *Lacunae* in the law are inevitable, but it is difficult to believe that they can be adequately filled by a system that could punish a man for publishing an indecent book and leave him free to swindle his employer or misappropriate property in circumstances not amounting to larceny. The difficulties besetting law reform by Parliament have arisen far less where criminal law has been concerned. The enactment of a criminal code would doubtless

⁶⁰ [1933] 1 K. B. 529.

⁶¹ Australian Law Journal, vol. 7, p. 435, vol. 8, p. 490, vol. 9, p. 131.

⁶² *United States of America v. Flores* (1932) 77 Law. Ed. 1091, *per* Stone J.

⁶³ American 'Corpus Juris', vol. 16, sect. 23.

⁶⁴ American 'Corpus Juris', Annotations 1933—1936, Criminal Law, sects. 23 and 25. The writer has not had access to enough American reports to be able to give further information. Louisiana is not a common law state.

be a formidable undertaking, but there has been little difficulty in creating new offences by legislation as occasion has arisen.⁶⁵ Freedom in the judiciary to declare new offences may be criticized from many points of view: the historical and comparative approach suggests that the retention of this judicial power is of little value, and that, weighed against the uncertainties it creates, it is definitely undesirable.

⁶⁵ *E.g.* Road Traffic Act, 1930, s. 28, to meet the practice of unauthorised use of motor cars.

PROMISES TO PERFORM AN EXISTING DUTY.

A. G. DAVIS.

IN December, 1934,¹ the ex-Lord Chancellor asked the Law Revision Committee 'to consider and report whether and, if so, in what respects the doctrine of consideration requires modification, and in particular to consider among other aspects of and observations upon that doctrine . . . (b) The rule that a promise to perform an existing duty is no consideration'.

This particular aspect of the problem upon which the Committee has been asked to report can be divided into two parts: first, where the promise to perform the existing duty is made to a person to whom the promisor is already bound; and second, where the promise is made to a third party.

There is a considerable dearth of case-law on the first part of the problem. Apart from the cases involving a promise to pay a smaller sum in satisfaction of a larger,² the cases most often cited in support of the proposition that a promise to do a thing which a person is already bound to another to do is not good consideration for a promise by that other, *e.g.* *Stilk v. Myrick*,³ can be supported on the additional ground of public policy. But despite this lack of authority⁴ and the possibility of supporting certain of these decisions on other grounds, it is on all sides an accepted principle that, to quote the words of Sir Frederick Pollock,⁵ 'neither the promise to do a thing nor the actual doing of it will be a good consideration if it is a thing which the party is already bound to do either by the general law or by a subsisting contract with the other party'. Hence only legislation can abolish this principle if, as it is hoped, the Committee suggests its abolition.

But the second part of the problem raises much more debatable points; and it is submitted that, on existing authority, it is quite competent for the Courts to decide that a promise by one person to another to do what he is already bound by contract⁶ with a

¹ See [1934] W. N. 330.

² *E.g. Pinnel's Case* (1602) 5 Co. Rep. 117.

³ (1809) 2 Camp. 317.

⁴ See also *Deacon v. Gridley* (1854) 15 C. B. 295.

⁵ *Principles of Contract*, 10th ed. p. 181.

⁶ Different considerations, which are not discussed in the present article, arise when the legal bond has been imposed extra-contractually.

third party to do does constitute good consideration, and that, so far as this problem is concerned, the report of the Law Revision Committee could be limited to an up-to-date statement of the principle involved, with a suggestion, if it appeared fit, for its statutory confirmation.

The problem is one which was keenly debated in the United States some forty years ago⁷ and, it must be admitted, on it English writers are not altogether unanimous in their conclusions.⁸ The terms of Lord Sankey's reference to the Law Revision Committee make the present an opportune time for a reconsideration of the authorities.

No case reported in England and, it appears, none to which American writers have directed their attention, directly settles the point. It does not seem to have been decided that a promise by A to B to do what he (A) is already legally bound by contract with C to do constitutes good consideration. The cases approximating most closely are those in which it has been held that the actual doing by A of something which he is already legally bound by contract with C to do is good consideration for B's promise to A.⁹

These cases are very relevant, for if the doing of the act constitutes good consideration, then quite certainly, the promise to do that act is equally good—consideration comprising (*inter alia*) some detriment 'undertaken'.¹⁰

The earliest case in which this proposition finds support is *Bret v. J. S. and wife*.¹¹ A put his son to board with the plaintiff for three years at £8 per year. During the first year A died and M, his widow, in consideration of natural love and affection to her son and in consideration that the son should during the residue of the three years continue with the plaintiff, promised to pay him £6 13s. 4d. for the son's board for the time past and £8 a year for every year thereafter that he stayed with the plaintiff. Action was brought for £6 13s. 4d. and for two

⁷ Cf. Williston, 'Successive Promises of the Same Performance' (1894) 8 Harvard Law Review 27, and Langdell, 'Mutual Promises as a Consideration for Each Other' (1901) 14 Harvard Law Review 496.

⁸ Compare, for example, Salmond & Winfield, Law of Contracts, p. 85, with Anson, Law of Contract, 17th ed. pp. 103 *et seq.*

⁹ Certain readings of these cases, which are discussed *infra*, suggest that they were actually cases of promise for promise: but the consideration pleaded in each case was performance.

¹⁰ *Currie v. Misa* (1875) L. R. 10 Ex. at p. 162.

¹¹ (1600) Cro. Eliz. 755, pl. 20. Sir Wm. Holdsworth (H. E. L. vol. viii, p. 18) deals with this case solely as authority for the principle that natural love and affection does not constitute good consideration. But the Court laid down in the words quoted a very definite statement of its view of the law. I do not agree with Sir William (*ibid.* at p. 23) that *Sherwood v. Woodward* (1600) Cro. Eliz. 700, is an authority on this point. The plaintiff in that case undertook to do what he was not previously under an obligation to do: *viz.* actually to deliver the cheeses and, it appears, at another place.

years' tabling. The Court found in favour of the plaintiff. Natural love and affection was not good consideration, but 'that the son should afterwards continue at his table is good as well for money due before as for what should afterwards become due'.

Next comes the case of *Bagge v. Slade*.¹² Two men had gone surety for the debt of a third. Upon their becoming liable to pay the debt one said to the other: 'Pay you all the debt and I will pay you the moiety of this again.'¹³ The promisee accordingly paid the whole of the debt and sued the other upon his promise for payment of the half. The defendant pleaded absence of consideration, but his plea failed. The Court (Coke C.J. and Dodderidge J.) does not seem to have addressed itself to the point that the plaintiff was already legally bound to the original creditor to pay the debt, but contented itself with considering whether the plaintiff was 'put to charge' which he undoubtedly was.

The report of *Westbie v. Cockaine*¹⁴ is solely to the effect that if A and B are bound in an obligation of £10 to C for the proper debt of A and after A dies and E, A's wife, promises B in consideration that B will pay the £10 to C she will repay it to B, no action on the case lies against E upon this promise, because there is no consideration for E to make such promise and B was before bound to pay it and not E.

But in the later case of *Moore v. Bray*¹⁵ there is a *dictum* that when a debt is jointly due by two, it is a good consideration that if the other will pay one moiety, he himself will discharge the other of an obligation of £10. *Moore v. Bray* is in accord with *Bagge v. Slade* and this *dictum* is to be preferred as a correct statement of the law to what appears in *Westbie v. Cockaine*.

The question does not seem to have been raised again in any case deemed worthy of report until the much-debated *Shadwell v. Shadwell*.¹⁶ The facts are well known. The plaintiff was engaged to marry a certain Miss Nicholl. On August 11, 1838, his uncle wrote to him: 'I am glad to hear of your intended marriage with Ellen Nicholl and as I promised to assist you at starting, I am happy to tell you that I will pay to you £150

¹² (1616) 3 Bulst. 162.

¹³ This case was decided many years before the equitable doctrine of contribution between co-sureties was established.

¹⁴ (1631) 1 Vin. Abr. 312, pl. 36.

¹⁵ (1633) 1 Vin. Abr. 310, pl. 31.

¹⁶ (1860) 9 C. B. (N.S.) 159; 30 L. J. C. P. 145; 7 Jur. (N.S.) 311; 3 L. T. 628; 9 W. R. 163. The judgments are reported equally well in all the Reports, but the Jurist reports the arguments better than the others.

yearly during my life and until your annual income derived from your profession of a Chancery barrister shall amount to 600 guineas; of which your own admission will be the only evidence that I shall receive or require.'

The plaintiff duly married Miss Nicholl and twelve of the annual sums promised by the uncle and part of the thirteenth were duly paid. The uncle having died, his executors refused to pay any further instalments. The plaintiff sued for the amount of the instalments accrued due, alleging that he had married Miss Nicholl in reliance on his uncle's promise. The defendants pleaded, in effect, lack of consideration for the uncle's promise. Defendants' counsel, seeking to show this absence of consideration, cited *Stilk v. Myrick*¹⁷ and *Clutterbuck v. Coffin*.¹⁸ Byles J. interposed: 'Those were cases of obligations to one of the parties: have you any case where the obligation has been to a stranger?' Counsel admitted he had not.

The Court (Erle C.J. and Keating J., Byles J. dissenting) found in favour of the plaintiff. Erle C.J., delivering the judgment of himself and Keating J., considered whether the facts showed first, a loss sustained by the plaintiff at the uncle's request and, secondly, a benefit derived by the uncle from the plaintiff at the uncle's request. It was held that they did. The judgment concluded: 'I do not feel it necessary to advert to the numerous authorities referred to in the learned arguments addressed to us because the decision turns upon the question of fact, whether the consideration for the promise is proved as pleaded. I think it is.'

The judgment is not wholly satisfactory. But this at least can be said of it: that it still stands as an authority for the proposition that the doing of an act which one is bound by contract with a third party to do constitutes good consideration for a promise made in return for the act. The dissenting judgment of Byles J. seems to proceed on the assumption that the uncle's letter was never intended to create a contractual relationship between the parties. He said¹⁹: 'Marriage of the plaintiff at the testator's express request would no doubt be ample consideration.' The learned judge presupposes a contract to marry on the plaintiff's part and considers that the actual marriage, if contracted at the uncle's express request, would be sufficient consideration. It is the absence of an express request which seemed to determine the learned judge. That being his main

¹⁷ (1809) 2 Camp. 317.

¹⁸ (1842) 3 Man. & G. 842.

¹⁹ 9 C. B. (N.S.) at p. 175.

contention, he explained it by reference to the authorities 'which have been cited at the bar in support of the position that a promise based on the consideration of doing that which a man is already bound to do is invalid'. And he added that it was not necessary, in order to invalidate the consideration, that the plaintiff's prior obligation should have been made to the defendant. It may have been to a third person. In support he cited *Herring v. Darell*²⁰ and *Atkinson v. Settree*.²¹ But neither of these cases actually lent support to his statement. They were both cases in which a promise had been made in consideration of the promisee releasing a third party from custody. They were not cases in which the promisee was contractually bound to perform an act. There was, in each case, a definite legal duty on the promisee's part not to detain the third person in custody. It would admittedly be a bold contention that there was good consideration for a promise by A to pay B money if he did not falsely imprison C. B is under a duty not to do so—a duty imposed by the law; he is not merely under an obligation imposed by the parties.

The judgment of Byles J. would have carried much greater weight and might well have led to the subsequent overruling of the majority decision, had he been able to adduce an authority—as defendants' counsel was invited to do—for his statement that in order to invalidate the consideration the prior *obligation*, *i.e.* a duty imposed by the parties *inter se*, may have been to a third person. The judgment cannot be disregarded in any serious discussion of the case, but, on analysis, it loses much of its cogency and cannot be said to impugn, to any great extent, the judgment of the majority of the Court.

In the following year *Shadwell v. Shadwell's* legal twin, *viz. Scotson v. Pegg*,²² was decided. The defendant promised that in consideration of the plaintiff delivering to him a cargo of coal then on board the plaintiff's vessel, he would unload the cargo at the rate of forty-nine tons a day. The defendant took five days longer than the agreed time in unloading and in consequence the plaintiff was put to expense in maintaining the crew and keeping the vessel in working trim. For this expense he sued the defendant. The defendant pleaded lack of consideration in that the plaintiff by another contract made between him and the shippers of the coal agreed to carry the coal and to deliver it to the order of the shippers from whom the defendant had bought

²⁰ (1840) 8 Dowl. P. C. 604.

²¹ (1744) Willis 482.

²² (1861) 6 H. & N. 295; 30 L. J. Ex. 225; 9 W. R. 280; 3 L. T. 753.

it. The plea failed. *Shadwell v. Shadwell*²³ was relied on by the plaintiff and the judgment of Byles J. in the same case was relied on by the defendant. Neither of the judgments in that case was referred to in the judgments in *Scotson v. Pegg*, but at least the Court was fully cognisant of them. Both the judges who delivered judgment (Martin and Wilde BB.) based their decisions on the benefit to the defendant as well as detriment to the plaintiff. Martin B. prefaced his judgment with a sentiment which should find favour to-day amongst those who desire the law to keep touch with modern conditions: 'I am clearly of opinion that the plea [of absence of consideration] is bad, both according to law and to common sense and I am always glad when they agree.'²⁴ Dealing with the question of detriment to the plaintiff he said that there might have been some dispute as to the defendant's right to have the coal or that the plaintiff might have detained it for demurrage. In either case there would be good consideration in that the plaintiff, who was in possession of the coal, would allow the defendant to take it out of his ship. Was it then any answer that the plaintiff had entered into a prior contract with the shippers to deliver the coal to their order upon the same terms and that the defendant was a stranger to the contract? In his opinion it was not. 'We must deal with this case as if no prior contract had been entered into.'

Wilde B. raised the point which has been much relied on by writers who seek to uphold the judgments.²⁵ 'In this case the defendant was a stranger to the original contract and had no remedy for breach of it, yet he induced the plaintiff to do that which he might not have chosen to do, but might have said: "I will break my contract and leave the other party to his remedy."' Here the immediate delivery of the coal to the defendant formed a valid consideration.²⁶

In *Scotson v. Pegg* no doubts were raised on the question whether the parties intended to enter into contractual relationships. The Court was thus free to deal directly with the question whether the performance in favour of the third party did constitute good consideration and it unhesitatingly answered that question in the affirmative.

*Chichester and wife v. Cobb*²⁷ was a case somewhat similar

²³ (1860) 9 C. B. (N.S.) 159.

²⁴ This statement appears in the *Law Times* report only.

²⁵ Cf. Corbin, 'Does a Pre-existing Duty defeat Consideration?' (1918) 27 Yale Law Journ. 362. Salmond & Winfield, *op. cit.* p. 85.

²⁶ These words appear in the *Law Times* report only.

²⁷ (1866) 14 L. T. 433.

to *Shadwell v. Shadwell*.²⁸ The plaintiffs had agreed to marry and upon treaty for the marriage and, as stated in the declaration, 'in consideration thereof' the defendant promised the female plaintiff that as soon as all pecuniary and other necessary arrangements were made to constitute an unquestionable legal marriage he would pay over £300 for her benefit. The marriage duly took place, but the money was not paid and so was sued for. Blackburn J., in the course of the argument, said: 'I think the declaration sets out a contract to pay £300 in consideration of the plaintiffs marrying.' There was, he said in his extremely brief judgment, a perfectly sufficient contract founded upon sufficient consideration.

By itself, this case might not carry any great weight, but it is useful as indicating the trend of judicial opinion at a time when the doctrine of consideration was still in the process of being settled.

The point does not seem to have been raised directly in any reported case in England since,²⁹ but two American cases are instructive.

The first is *Abbott v. Doane*.³⁰ The plaintiff had given his accommodation note to a corporation which had discounted it at a bank and left it unpaid at maturity. The defendant was a shareholder in the corporation and, wishing to have the note paid at once, entered into an agreement with the plaintiff whereby he was to give the plaintiff his own note for the amount and the plaintiff was to furnish money to enable the defendant to take up the note at the bank. The agreement was duly carried out, but on the defendant being sued on his note, he contended that there was no consideration for his promise because the plaintiff was already bound to take up his own note at the bank. This contention failed.

In his judgment Allen J. took the illustration of A who enters into a contract with B to do something and pointed out that A was legally bound only to B and that if he broke his contract nobody but B could recover damages, and those damages might be slight. He continued³¹: 'If after A has refused to go on with his undertaking, or while he is hesitating whether to perform it or submit to such damages as B may be entitled

²⁸ (1860) 9 C. B. (N.S.) 159.

²⁹ In *Skeete v. Silberberg* (1895) 11 T. L. R. 491, there was ample consideration in that the plaintiff, in reliance on the defendant's promise, married sooner than she had intended to. Moreover, it was one of the terms on which payment was to be made by the defendant that the marriage should take place within three months.

³⁰ (1895) 163 Mass. 433.

³¹ *Ibid.* at p. 435.

to recover, other persons interested in having the contract performed intervene, and enter into a new agreement with A, by which A agrees to do that which he was already bound by his contract with B to do and they agree jointly or severally to pay him a certain sum of money, and give their note or notes therefor, and A accordingly does what he had before agreed to do, but what perhaps he might not otherwise have done, no good reason is perceived why they should not be held liable to perform their promise. They have got what they bargained for, and A has done what otherwise he might not have done, and what they could not have compelled him to do. This has been so held in England and the view is supported by English text-writers, though not always for precisely the same reasons. *Scotson v. Pegg*, *Shadwell v. Shadwell*.'

The other case is *Attilio De Cicco v. Schweizer*.³² The defendant set forth in a memorandum that whereas his daughter Blanche was affianced to and was to be married to Count Oberto Gulinelli, in consideration of that fact he promised to pay annually to his daughter the sum of \$2,500. Four days after the memorandum had been signed and delivered, the marriage took place. Ten annual payments were made, but, the eleventh not being forthcoming, was sued for, the plaintiff being the assignee of the daughter and her husband. The Court held that there was sufficient consideration for the defendant's promise.

Cardozo J., after adverting to the extra-judicial opinions on the point in issue and after a brief reference to *Shadwell v. Shadwell* said³³: 'They [the husband and wife] were free by common consent to terminate their engagement or postpone their marriage. If they forbore from exercising that right and assumed the responsibilities of marriage in reliance on the defendant's promise, he may not now retract it.'

Professor Corbin has expressed the opinion³⁴ that this case would be a starting-point in the reversal of a large number of decisions and in the abandonment of a rule at that time generally prevailing in the U.S.A., viz. that performance in favour of a third party of a pre-existing duty afforded no consideration for that third party's promise.³⁵

So much for the authorities. The opinions of text-writers must be considered.

Sir Frederick Pollock³⁶ takes the view that a promise given

³² (1917 N. Y.) 117 N. E. 807.

³³ *Ibid.* at p. 809.

³⁴ (1918) 27 Yale Law Journal 362.

³⁵ Compare, American Law Institute, 'Restatement of Contracts' (1932) 84(d).

³⁶ *Op. cit.* pp. 183 *et seq.*

in exchange merely for the performance of the promisee's duty under an existing contract with a third person is not binding, the element necessary to constitute the consideration, *viz.* detriment to the promisee, being absent. He admits, however, that authority is the other way as far as it goes. He criticizes *Bagge v. Slade*³⁷ on the ground that the point in issue was not dealt with; *Shadwell v. Shadwell*³⁸ on the ground that while to the majority of the Court it appeared sufficient to say that the marriage took place at the testator's request, this did not answer the question whether the simple fulfilment of a promise of marriage already binding on him could be any legal detriment to the promisee. But Sir Frederick appears to have overlooked the words at the beginning of the judgment of Erle C.J., where he addressed himself to the question: 'Do these facts show a loss sustained by the plaintiff?' That question he answered in the affirmative. It may be argued with reason that the learned Chief Justice was not entitled, as a matter of law, to give an affirmative answer to that question. But the fact remains that he did so and, what is of greater importance, that there was no precedent authority brought to the notice of the Court, and it is doubted whether any such could be found, which directly precluded him from giving this affirmative answer.

Of *Scotson v. Pegg*,³⁹ the learned author complains that the Court assumed that the rule must be the same whether the consideration relied on is a performance already due to a third party or a new promise of that performance to the defendant. He makes no reference to the pertinent remarks of Wilde B. quoted above⁴⁰ that the defendant had induced the plaintiff to do that which otherwise he might not have chosen to do.

But Sir Frederick Pollock is unhesitatingly of opinion that a promise by A to B to do something which he has already promised C to do does constitute a legal obligation if supported by sufficient consideration on B's part. He meets the objection put forward by certain writers⁴¹ that A's promise is a good consideration only if it is binding and that we have no right to assume that it is binding, by saying that the objection, if good for anything, is equally good to prevent mutual promises from ever being a consideration for each other. That such promises are a good consideration for each other is beyond dispute.

Anson⁴² considers the decisions in *Shadwell v. Shadwell* and

³⁷ (1616) 3 Buls. 162.

³⁹ (1861) 6 H. & N. 295.

⁴⁰ See p. 207, *supra*.

⁴¹ *E.g.* Anson, *op. cit.* p. 105; Williston, *loc. cit.* at p. 35.

⁴² *Op. cit.* p. 106.

³⁸ (1860) 9 C. B. (N.S.) 159.

Scotson v. Pegg inconclusive, but agrees that, on the whole, it is not unreasonable to say that the performance of or the promise to perform an outstanding contract with a third party may be good consideration for a promise. Anson's criticism of *Shadwell v. Shadwell* loses much of its point because he introduces the suggestion that the words in the uncle's letter, 'to assist you at starting' might more naturally refer to the nephew's start in his profession than to his marriage. But on the facts disclosed in a footnote to the report,⁴³ such a suggestion is untenable, for the plaintiff's professional career started at Easter, 1832, and the uncle's letter was not written until August, 1838.

Sir William Holdsworth⁴⁴ doubts whether A's performance of his contractual duty to B can be consideration for a promise by C to A, there being no detriment to A which can afford a consideration. But he agrees⁴⁵ that the better opinion would seem to be that a promise by A to C to perform his contractual duty to B may be consideration for a promise by C to A. The learned author is undoubtedly disturbed by the authorities quoted above, but explains them by, it is submitted, an unfortunate reading of the facts. *Bagge v. Slade*⁴⁶ he regards as a case of promise for promise. The report of this case is admittedly meagre. One must agree with Sir William that, when the promise of repayment was made, the original debt had not been paid by the plaintiff. But was not the consideration on which the plaintiff sued the actual payment and not the promise?⁴⁷ In *Shadwell v. Shadwell*⁴⁸ the learned author finds a consideration that the plaintiff did more than he was bound to do under his promise of marriage; that is, he married the lady at once. But, as Sir Frederick Pollock points out,⁴⁹ that fact was not averred, as it was, for example, in *Skeete v. Silberberg*.⁵⁰ It can hardly be doubted that the decision would have been the same had the marriage taken place later. *Scotson v. Pegg*,⁵¹ the learned author states, did involve the exact point of promise for

⁴³ 9 C. B. (N.S.) at p. 170.

⁴⁴ *Op. cit.* vol. viii, pp. 40—41.

⁴⁵ *Ibid.* pp. 23—24, 40—41.

⁴⁶ (1616) 3 Bulst. 162.

⁴⁷ See 3 Bulst. at p. 163: 'The plaintiff [in the writ of error] said: pay you all the debt and I will pay you the moiety of this again and *which he paid accordingly* and so made a request to have repayment.' Cf. also Coke, C.J., at p. 164: 'If a man *pays* unto him £500 . . . this is a good and sufficient consideration.'

⁴⁸ (1860) 9 C. B. (N.S.) 159.

⁴⁹ *Op. cit.* p. 199, n. (q). On the facts of the case as reported, the marriage could hardly have taken place at once for obviously the uncle had an opportunity of revoking his offer. See 9 C. B. (N.S.) at p. 173.

⁵⁰ (1895) 11 T. L. R. 491.

⁵¹ (1861) 6 H. & N. 295.

promise and he quotes in support, Wilde B., 'I accede to the proposition that if a person contracts with another to do a certain thing, he cannot make the performance of it a consideration for a new promise to the same individual. But there is no authority for the proposition that where there has been a promise to one person to do a certain thing, it is not possible to make a valid promise to another to do the same thing.' But this statement is *obiter*. The declaration alleged actual performance by the plaintiff.

In short, Sir William takes the view that a promise of performance, but not performance itself, constitutes good consideration. He finds ample support for his conclusion in his particular reading of the authorities mentioned above.⁵²

Salmond and Winfield⁵³ hold that either the performance or promise of performance of an act which is already obligatory towards a third party constitutes good consideration. None of the cases mentioned above is discussed, but the argument adduced in favour of the proposition is that the promisor, by promising to do something which he is already bound to a third party to do, incurs the real disadvantage of having deprived himself thereby of any opportunity of getting rid of that duty by agreement with the actual promisee.⁵⁴ So also the actual performance of the duty to the stranger may be a sufficient detriment to him who does it to constitute a good consideration for a promise. For *non constat* that he would ever have been called upon to do it.

Leake⁵⁵ says that a person may promise to a third party to do what he is already bound to do by contract with another; and such promise is a sufficient consideration to support a new contract with a third party. He cites *Morton v. Burn*⁵⁶ in which case a promise by a debtor to pay the assignee of the debt was held to be good consideration. But this case is hardly an authority for the statement quoted because, at common law, payment to the assignee does not result in the discharge of the original obligation: it is not the same thing as the debtor was originally bound to do.⁵⁷ The present editor includes *Scotson v. Pegg* as an authority, but does not discuss the case; nor is *Shadwell v. Shadwell* discussed in connexion with this problem.

⁵² If the learned author's reading of *Sherwood v. Woodward* (1600) Cro. Eliz. 700 is correct, then that case is undoubtedly an authority for the proposition stated by him. But for the reasons given in note 11, I do not agree with his reading.

⁵³ *Op. cit.* p. 85.

⁵⁴ This is the alleged argument in a circle to which Williston (*loc. cit.*) objected.

⁵⁵ Principles of the Law of Contracts, 8th ed. p. 464.

⁵⁶ (1837) 7 L. J. Q. B. 104.

⁵⁷ See (1906) 22 L. Q. R. 323.

In the first edition of his work Leake said ⁵⁸ that so far as regards the matter of the consideration, as being executed or executory, it may be observed that whatever matter, if executed, is sufficient to form a good executed consideration, if promised, is sufficient to form a good executory consideration: so that the distinction of executed and executory consideration had no bearing upon the question of the sufficiency of any particular matter to form a consideration. This statement, owing no doubt to exigencies of space, does not appear in the latest edition, but it would seem to show that Mr. Leake himself held the opinion that both performance and promise constituted good consideration.

Professor Williston, in discussing this problem, has, rightly, given greater weight to the American than to the English decisions. In his earlier article ⁵⁹ he says that the well-known cases of *Scotson v. Pegg* and *Shadwell v. Shadwell* establish the English law that 'performance or promise of performance of something which one was at the time bound to perform by contract with a third person is a sufficient consideration'. But he says that these decisions can only be rested on the ground that the performance was a benefit to the defendant, and this conclusion he reaches without any close examination of the arguments or the judgments. He repeats this assertion in a later article ⁶⁰ and adds that the argument of the Courts by what is not said as well as by what is said, seems to make plain that these Courts regard either the actual doing, or the promise to do such a beneficial act, as sufficient consideration. ⁶¹ Sufficient has been said of these decisions to show that it is possible to support them on the ground of detriment to the plaintiff, and Professor Williston's support for the general proposition now being contended for is of rather a negative character.

On general principles and on the authority of certain American decisions, the learned author reaches the conclusion that doing what one is bound to do is not a good consideration. Regarding a promise to do what one is already bound to do, he

⁵⁸ *Op. cit.* p. 314.

⁵⁹ 'Successive Promises of the Same Performance' (1894) 8 Harvard Law Rev. 27.

⁶⁰ 'Consideration in Bilateral Contracts' (1914) 27 Harvard Law Rev. 472.

⁶¹ Professor Williston's arguments based on what was not said accord strangely with his statement earlier in the article that to seek for another basis to support a decision, when the ground on which the Court rested its decision is not shown to be inadequate, is to treat the rulings of the Courts 'as the utterings of Balaam's ass, absolutely true, but not presupposing any conscious intelligence in the creatures from which they proceed,' a quotation from Professor Gray in 7 Harvard Law Rev. 406. It is often difficult enough to appreciate the meaning of the utterings, but to go further and seek support from what has not been said, is hardly to strengthen an argument.

deals with the theory advanced by Sir Frederick Pollock that a promise to do something is always a detriment and that therefore the second promise is always a good consideration, by agreeing that if that statement is open to criticism on the ground that it assumes that the second promise does impose an obligation upon the promisor, then the same criticism may be made in the case of every bilateral contract. For, he says, to enter into a binding obligation to do or not to do anything whatever is always a detriment, and, on the other hand, unless a promise imposes an obligation, no promise whatever can be considered a detriment. It is therefore assuming the point in issue to say that a promise is a detriment because it is binding. But Professor Williston realizes that some escape from such a conclusion is necessary and seeks it by 'revising slightly the test of consideration in a bilateral contract, seeking the detriment to support a counter-promise, in the thing promised, and not in the promise itself'. Ames's objection to this proposal is mentioned later, but it may also be said that a theory which must find its support in a revision of an accepted and strongly substantiated doctrine, while meriting attention, cannot be accepted in the face of contrary opinion.

Professor Williston seeks to meet criticism of his argument by saying: 'It must be remembered that English text-writers labour under the disadvantage of feeling bound to support and furnish some explanation of the decisions in *Shadwell v. Shadwell* and *Scotson v. Pegg*. If it were not for this, it is quite possible that the matter would be discussed in another fashion.' Even if the truth of this statement be admitted, it can do nothing to impugn the authority of those cases which at the time Williston first wrote had stood unreversed for thirty-five years. After all, English—and for that matter American—text-writers can only deduce statements of principle from decided cases.

In his later article ⁶² Professor Williston admits to having changed his mind and supports the English cases and such American decisions as follow them in upholding the second agreement, whether unilateral or bilateral. His support still comes, however, from what, it is submitted, is a one-sided reading of the cases, in that he finds the consideration in the legal benefit to the promisor. But, all in all, Professor Williston, on whatever grounds, now supports the second agreement.

Ames ⁶³ agrees that both performance and promise are good

⁶² (1914) 27 Harvard Law Rev. 503.

⁶³ 'Two Theories of Consideration' (1899) 12 Harvard Law Rev. 515; 13 *ibid.* 29.

consideration: performance in accordance with the English cases and *Abbott v. Doane*⁶⁴; promise in accordance with general principles. He deals with the argument of Anson and those who agree with him that to concede the validity of the second promise involves arguing in a circle, by showing that that argument applies, as Williston admitted, with equal force to all cases of mutual promises. He objects to Williston's proposal to 'revise slightly the test of consideration in a bilateral contract, seeking the detriment necessary to support a counter-promise in the thing promised and not in the promise itself', in that the test proposed is artificial and that the assumption of validity of the promises covered by the test itself involves question-begging.

He concludes a trenchant argument with an illustration of a father who, wishing his son to live in a house near his own, promises to furnish the house in return for the son's promise to buy it of X, the owner. Subsequently the son and X enter into a mutual written agreement for the purchase of the house. The father then learns that a more desirable house may be obtained at the same price, and agrees to furnish that instead of the other. The son accordingly notifies X that he will not take X's house and when reminded of his contract answers, 'Oh, our agreement was no contract. I had already promised my father to buy the house, so my promise to you to buy it was no consideration for your promise and both promises are worthless.' Would any Court, asks the learned author, exonerate the son?

The only other text-writer to whom reference will be made is Professor Corbin.⁶⁵

He is of opinion that both performance and promise constitute good consideration. Dealing with the common example of A's performance in favour of C of an act which he is already bound towards B to perform, and to what extent a detriment to A is created thereby, Professor Corbin says: 'There is another valuable power possessed by A that is effectively extinguished by this full performance of the acts required by his duty to B, one that he is legally privileged to exercise. That is the power to offer a rescission to B. This is not a power to rescind: neither party to the contract has such a power. It is a power to create in B the power to rescind by accepting A's offer of rescission.' He also draws attention to the very pointed assertion of Judge

⁶⁴ (1895) 163 Mass. 433.

⁶⁵ (1918) 27 Yale Law Journal 362, 'Pre-existing Duty as Consideration'. Reference may also be made to Langdell, 'Mutual Promises as a Consideration for Each Other', (1901) 14 Harvard Law Rev. 496, and Morgan, 'Benefit to the Promisor as Consideration for a Second Promise for the Same Act' (1917) 1 Minnesota Law Rev. 383.

Cardozo in *Attilio De Cicco v. Schweizer*⁶⁶ that the probability of acceptance by B of the offer to rescind is exceptionally high in engagements to marry.

If, by performance, one loses the power of offering rescission, so also does one lose that power by a promise of performance to a third party. In any event he loses it to the extent that the offer of rescission must now be made to two persons instead of to one. Surely that is a detriment.

To sum up, there is a very considerable body of opinion amongst text-writers that performance of a pre-existing contractual duty is a good consideration for a third party's promise. In addition there is definite authority for that proposition; authority which, even allowing that *Bagge v. Slade*⁶⁷ was a case of promise for promise, has stood unchallenged in the Courts, if not by extra-judicial opinion, for over seventy years. How much weight that extra-judicial opinion may be expected to sustain has, it is hoped, been demonstrated in this article.

There is, too, amongst text-writers on both sides of the Atlantic an overwhelming body of opinion,⁶⁸ opinion which, when subjected to rigorous criticism, must still be regarded as sound, that a promise of performance of an already existing contractual duty is good consideration for a third party's promise. The present article is concerned chiefly with supporting the latter theory, but the former theory has been dealt with at length, for it must be admitted that if it were to be decided judicially that the promise theory was untenable, then the performance theory would have to go too and *Shadwell v. Shadwell*,⁶⁹ *Scotson v. Pegg*⁷⁰ and *Chichester v. Cobb*⁷¹ would have to be considered as overruled. But those who see in the doctrine of consideration as it at present exists in English law so many objectionable features, one of which was said⁷² to be apt to nip any budding affection which a great lawyer, trained in another system, might have had for the doctrine, hope that the next pronouncement on the validity or invalidity of the conclusions stated above will come, not from the Bench, but from the Legislature; and that all doubts and difficulties attendant on the doctrine will be solved by its abolition.

⁶⁶ (1917, N. Y.) 117 N. E. 807.

⁶⁷ (1616) 3 Buls. 162.

⁶⁸ For the 'state of the polls' in 1904, see 20 L. Q. R. 9. To the 'ayes' there must now be added Professor Corbin; and Professor Williston's vote must be treated as invalid.

⁶⁹ (1860) 9 C. B. (N.S.) 159.

⁷⁰ (1861) 6 H. & N. 295.

⁷¹ (1866) 14 L. T. 433.

⁷² By Lord Dunedin in *Dunlop v. Selfridge* [1915] A. C. 847, at p. 855.

FURTUM PROPRIUM AND FURTUM IMPROPRIUM.

DAVID DAUBE.

ACCORDING to P. Huvelin¹ the *lex Atinia* read as follows: *Quod subruptum erit, nisi in potestatem eius, cui subruptum est, revertatur, eius rei aeterna auctoritas esto.* This reconstruction is no doubt fairly accurate.² What, then, is the relation of the *lex Atinia* to the XII Tables? For, as it appears from the sources,³ it was already the XII Tables that excluded a *res furtiva* from usucaption.

In considering this question Huvelin starts, rightly, from the assumption that the *lex Atinia* did not simply repeat a well-established rule of the Code.⁴ His solution of the problem, however, is difficult to believe. There is a difference, he says,⁵ between a *res furtiva* and a *res subrepta*. He says that, whilst *subripere* refers only to those cases in which a thing is actually taken away in secret, *furtum* proper means fraud and—since immovables are not capable of being taken away from their places—usurpation of land.⁶ Hence it would follow that there may well have existed two separate laws, one of them concerning a *res subrepta* and the other a *res furtiva*. But at this point a new difficulty arises. Starting from the above text of the *lex Atinia* on the one hand and from the supposed distinction on the other hand, one is driven to the conclusion that the XII Tables cannot, in fact, have dealt with the *res furtiva*. It would be highly improbable that, if the *lex Atinia* applied only to goods that had actually been carried off, the XII Tables should have prohibited usucaption of goods obtained by fraud, thus having a much larger scope and referring to a subtler kind of offence at an earlier date. To evade this dilemma Huvelin states that, in spite of contrary tradition, the XII Tables did not mention the point at all.⁷ In his opinion the

¹ Études sur le Furtum, p. 287.

² As to a minor point, see below note 43.

³ For references see P. Huvelin, *loc. cit.* p. 256.

⁴ Pp. 290 *et seq.*

⁵ Pp. 272 *et seq.*

⁶ In Huvelin's words, p. 272, *furtum* proper consists in *détournements, abus de confiance, usurpation d'immeubles etc.*

⁷ Pp. 290 *et seq.*

lex Atinia, directed against usucaption of a *res subrepta*, was the first statute to take up the matter. When, subsequently, usucaption of a *res furtiva* became also forbidden, people falsely ascribed to the XII Tables this later and more comprehensive principle.

With regard to the method underlying these arguments, it may be remarked that it is certainly permissible to derive a theory from the texts—as in this case the contrast between *res furtiva* and *res subrepta*—even though the texts themselves do not make express mention of it. But it is always dangerous to go farther and to use this result, more or less conjectural in itself, for proving the sources wrong. In fact, if Huvelin's view as to *res furtiva* and *res subrepta* is not in harmony with the existing evidence, i.e. that both the XII Tables and the *lex Atinia* specified defects that should bar usucaption, this is a strong indication that a very different course must be taken.

We have now to examine his contentions in detail and, first of all, the view that there must have been a relevant difference between a *res furtiva* and a *res subrepta*. Obviously, the main basis of this view is the vague yet widely spread conception that, at the outset, words have a narrow, well-defined sense, which is only extended by gradual stages: thus *furtum* and *subripere* are held each to have had an individual, strictly exclusive meaning, and not to have been confused till after the *lex Atinia*. The premise, however, is weak. It is exactly in primitive times that the range of a word is comparatively wide, words representing a certain complex of ideas, a set of circumstances rather than a particular, concrete thing. Hence the characteristic use, made e.g. by the *lex Aquilia*, of simple verbs instead of compound ones. Hence the fact that *caput* signifies not only head as part of the body but also man. Hence the fact, too, that *furtum* means as well the crime of theft as the stolen thing.⁸

Another reason advanced by Huvelin is taken from etymology. He claims that, considering the roots of *subripere*, and its frequent equivalent in early texts *subrumpere*,⁹ it is clear that these words imply the actual removal of a thing. But so, surely, does *furtum*, if one accepts the most probable explanation that it is connected with *ferre*. At any rate, it is not advisable to rely too much on etymology. There are several places in legal literature where *subripere* does not mean 'to take

⁸ We need not decide whether one of these meanings is prior to the other; cp. Huvelin, p. 487. Probably both of them are of equal age.

⁹ Huvelin, p. 271, n. 3, suggests that *subripere*, wherever it occurs in Plautus, might be a sign of interpolation. But even if it were so, his theory could not be saved.

away' but to creep up, to insinuate oneself.¹⁰ Again, the *furtum* of the XII Tables is certainly not deceit, but theft. This Code lays down that *si nox furtum faxit, si im occisit, iure caesus esto*¹¹: it is not likely that a man should be exempt from punishment, if he kills a peaceful visitor merely because he is trying to cheat him. Similarly the notions of *furtum manifestum* and *nec manifestum* are wholly unintelligible unless *furtum* is regarded as theft. We may suppose that even Huvelin does not go as far as to deny this. Yet he says that when Plautus uses *furtum* in the sense of *subreptio*, he is indulging in a colloquialism unknown to the technical language of law and lawyers.¹² It may be observed that, quite apart from the fact that Plautus is in complete agreement with the XII Tables, laymen and jurists at 200 B.C. can hardly have used very different terms for one of the most common offences.

We may, then, assume that no material distinction is to be made between *res furtiva* and *res subrepta* on linguistic grounds alone. On the contrary, this case seems to show once more that, originally, words have a rather loose meaning. It should be noted in this connexion that also in Hebrew and in Greek the words corresponding to *furtum* cover theft and fraud. But from phrases like לִבֵּן לֹב¹³ or κλέπτειν νόον¹⁴ one cannot possibly infer that, strictly speaking, לִבֵּן and κλέπτειν only designate fraud.

However, there is still the possibility left of the *lex Atinia* deliberately adopting a special signification of *subripere*, divergent from the ordinary one. As the law itself does not give any hint of it, one can only reason this way if evidence is offered by the Roman interpreters. Huvelin thinks there is, and as chief proof he cites D. 41. 2. 3. 3 (Paulus libro quinquagesimo quarto ad edictum).¹⁵

Neratius et Proculus et solo animo non posse nos adquirere possessionem, si non antecedit naturalis possessio. ideoque si thesaurum in fundo meo positum sciam, continuo me possidere,

¹⁰ E.g. Cod. Theod. 2, 23, 1, 2 (Imp. Honorius et Theodosius AA. Crispino Comiti et Magistro Equitum): *Ne quis sane post hanc definitionem nostri numinis surripiendo postulare audeat haec spatia . . . , poenam viginti librarum auri iubemus adscribi.* It may also be mentioned that, very possibly, the use of the word *subripere* was not without influence on the signification of *subripere*. Of course, ideas as to *furtum* and ideas as to *subripere* are not always exactly identical: but this is not the same thing as a definite, recognized distinction between the words.

¹¹ 8, 12.

¹² P. 272, n. 2.

¹³ Vide W. Gesenius (F. Buhl), Handwörterbuch über das Alte Testament¹⁶, s. v. לִבֵּן

¹⁴ Homer's Iliad 14, 217.

¹⁵ Pp. 273 et seq. Huvelin only cites the passage from *ceterum quod Brutus to quia scit alienum esse.*

simul atque possidendi affectum habuero, quia quod desit naturali possessioni, id animus implet. ceterum quod Brutus et Manilius putant eum, qui fundum longa possessione cepit, etiam thesaurum cepisse, quamvis nesciat in fundo esse, non est verum: is enim qui nescit non possidet thesaurum, quamvis fundum possideat. sed et si sciat, non capiet longa possessione, quia scit alienum esse. quidam putant Sabini sententiam veriore esse nec alias eum qui scit possidere, nisi si loco motus sit, quia non sit sub custodia nostra: quibus consentio.

It is difficult to see what this text has to do with the suggested contrast between *res furtiva* and *subrepta*. Huvelin remarks that Brutus, Manilius and Paul did not recognize *longi temporis praescriptio* as a mode of acquisition: they must have spoken of *usucapio*, the text in its present form being corrupt. This is no doubt true as far as Brutus and Manilius are concerned and, though with less certainty, may also be admitted with regard to Paul. It does not, however, bear on the problem of the *lex Atinia* in the least, unless one argues that where there is one interpolation there must be some more.

After pointing out ¹⁶ that the word *thesaurus* is used here in its older sense, *i.e.* of valuables which have been deposited in land but are nevertheless a definite owner's property, Huvelin goes on to say that the phrase *quamvis nesciat in fundo esse* did not belong to the *responsum* of Brutus and Manilius. The ancient jurists, he says, wasted no words. He thinks that the clause has been inserted by Paul in order to emphasize the exceptional laxity of the pre-classical rule. On this view, what remains of the original decision is that a person, acquiring a field by usucaption, acquires in addition a treasure hidden there. Why, asks Huvelin, was this decision wanted? We must consider, he urges, the limited scope of the *lex Atinia* and the text will become clear. As we have seen, he holds that this law only concerned the *res subrepta*, but did not include the *res furtiva*; the point being that, whilst *furtum* is fraud in general, *subripere* merely signifies the actual secret removal of a thing. In one respect only he takes *subripere* as the wider term of the two: according to him it does not matter whether the removal is accompanied by *bona* or by *mala fides*. Hence he infers that laying hold on a treasure is always an act of *subreptio* and, consequently, one should expect usucaption to be impossible. It was this conclusion, he maintains, which was refuted by Brutus and Manilius. They regarded a treasure as part of the field in

¹⁶ See pp. 274 and 276, n. 2; Huvelin's criticism, however, goes too far here.

which it was found. Now, he says, in early law a field is indeed capable of being a *res furtiva* but, since it cannot be removed from its place, it is never a *res subrepta* and may be usucapted under all circumstances. Therefore, he thinks, Brutus and Manilius necessarily arrived at the result that treasure should also be gained by usucaption. Huvelin thus claims that everything depended on whether or not the object in question was a *res subrepta* in the strictest sense; and, he adds, the text shows that the *lex Atinia* still permitted usucaption, if it was a case of *furtum* not committed by *subreptio*. He admits that all these propositions which, in his opinion, had been set forth by Brutus and Manilius are no longer to be found in the text. But he takes the view that, from Sabinus onwards, the jurists amalgamated *res subrepta* and *res furtiva*. New problems arose and the texts were altered accordingly.

Three phases of this emendation can be distinguished. As a first step Huvelin eliminates that part of the rule which, as handed down to us, displays the essential point: *quamvis nesciat in fundo esse*. His reason is that ancient lawyers would deliver a plain decision, free from superfluous *addenda*. This done, however, he says that Brutus and Manilius must have given some explanation of the circumstances that required a *responsum* and, since he has erased this explanation, he considers it as lost. So there is room for a fresh one and he finally reaches the conclusion that the gist of the *responsum* was the contrast, obscured by the classical jurists, between *res furtiva* and *res subrepta*. The chain of these arguments is fragile enough.

Assuming for a moment that *quamvis nesciat in fundo esse* was added by Paul, does the remnant justify this enormous series of hypotheses? Neither the *lex Atinia* nor *furtum* nor *subreptio* is referred to in the text, not to mention the difference between the two crimes which is said to make the very basis of the decision. It is true that a person appropriating a *thensaurus alienus*¹⁷ usually knows that he has no right to it. One cannot, however, accept Huvelin's view that the finder always acts in secret and that, therefore, the text need not state expressly that it is a case of *subreptio*. It is generally assumed that of the older kinds of usucaption the *usucapio pro herede* and the usucaption of things abandoned by their owner were the most important ones.¹⁸ In these cases he who appropriated goods

¹⁷ We must always keep in mind that *thensaurus* is used here in the older sense of the word.

¹⁸ P. Collinet, *Mélanges Fournier*, pp. 71 *et seq.*, and E. Levy, *Zeitschrift der Savigny-Stiftung, Roman. Abtlg.* 50, pp. 646 *et seq.*

did not commit an offence, although he knew they were not his. Moreover, Huvelin himself remarks that Brutus and Manilius treated a treasure as part of the field in which it lies. Thus, if that person took it who possessed the field in a manner sufficient for usucaption, *subreptio* was perhaps *a priori* out of question. But even if we consider the treasure mentioned in this text as *res subrepta*, how does it follow that this is not the same as a *res furtiva*? Indeed, Huvelin takes for granted what he sets out to prove. He asserts that Brutus and Manilius are concerned with the difficulty, arising under the *lex Atinia*, that a treasure, a *res subrepta*, is discovered in a field, a *res furtiva*. But there is not a single word to show that the field of which they speak is *res furtiva*. It is not even certain that Brutus and Manilius regarded a *furtum fundi* as at all possible. If, as Huvelin assumes, they did, what authority is there for saying that *furtum* was no bar to usucaption? ¹⁹ If they did not, which seems to me much more likely, ²⁰ a problem not less imaginable than Huvelin's would have been whether usucaption of a field comprises accessories, such as a treasure, although they may be *res furtivae*. There is one other point in his argument which, though not very material, wants brief consideration. He holds that he who removes a *thensaurus alienus*, though always acting in secret, may well have *bona fides*: it is, he says, *subreptio* in any case, the implication being that *subreptio*, as occurring in the *lex Atinia*, differs from *furtum* in that *mala fides* is not required. *L'apposition du préfixe sub*, he says, *ajoute au sens du radical une idée de clandestinité, de dissimulation. . . . De l'idée de dissimulation à l'idée de mauvaise foi, il n'y a qu'un pas, que les interprètes de la loi ont, sans doute, franchi assez tardivement.* ²¹ It is, however, not understandable why a man, who acts in good faith, should conceal his doings. Again, supposing somebody did take a treasure in good faith—a case certainly

¹⁹ According to D. 41. 3. 38 (Gaius libro secundo rerum cottidianarum sive aureorum) those jurists who declared theft of a field possible actually took the consequences and did not recognize usucaption of stolen land.

²⁰ This in spite of the fact that *furtum fundi* was known to several lawyers called *veteres* by Gaius, among them Sabinus (D. 41. 3. 38, 47. 2. 25 pr. and 1—Ulpianus libro quadragensimo primo ad Sabinum—and Gellius, Noctes Atticae 11. 18. 13). I do not think that theft of land can have been an original species of *furtum*. The phrase *furtum fundi* sounds to me like something of a metaphor: it may be an ingenious one, but it seems too artificial to date from the period of Brutus and Manilius. Obviously the theft dealt with by the XII Tables is theft of movable property only. Moreover, comparative law and also the etymology of *furtum*—*ferre*—point the same way. But, of course, it is an open question, and Huvelin, pp. 378 *et seq.*, takes the opposite view, in connexion with his whole theory of *furtum proprium* and *furtum improprium*.

²¹ Pp. 279 *et seq.*

very exceptional—, there is no evidence that it would be regarded as *res subrepta*. Last but not least, what should a law intend by excluding from usucaption goods which have been appropriated secretly, if not to exclude goods appropriated in bad faith? That the *lex Atinia* considered the possibility of a joke will scarcely be maintained. In fact, one simply cannot deny that *subripere* implies *mala fides*. There is no place where it does not. Huvelin lays stress on the fact that the *lex Atinia* merely has *quod subruptum erit*, without making it clear whether the *subreptio* is committed in good or in bad faith.²² But a text like, e.g., *quod subruptum erit mala fide* would contain a pleonasm quite unusual in early laws.

We may now give a more conservative interpretation of D. 41. 2. 3. 3.²³ Paul deals here with the problem of *corpus possessionis* and *animus possidendi*.

²² P. 275.

²³ The text has been the subject of much controversy recently; see Index Interpolationum, vol. 3. The writer owes much to Ch. Appleton's article, 'Le trésor et la iusta causa usucapionis,' Studi Bonfante, vol. 3, pp. 10 et seq. I doubt, however, if the text has actually suffered the alterations which he thinks it has. He contends that the first sentence of the paragraph is more easily intelligible, if one reads: *Neratius et Proculus et solo animo [non] posse nos adquirere possessionem, si [non] antecedit naturalis possessio*. But it is possible that, originally, there existed a passage, now lost, which preceded this sentence and in which it was explained that possession cannot be acquired *solo corpore*. If such is the case, the text is perfectly tenable in its present form. A point of more importance is that he declares the whole statement *sed et si sciat, non capiet longa possessione, quia scit alienum esse* to be interpolated. His linguistic argument is that a classical lawyer would not have used the same word *scire* twice within such a small space. Paul, he says, would have preferred to write *quia non ignorat alienum esse*. This is, however, not very convincing, since we do not know whether the horror of repetition was so strong among authors of the third century A.D. The material objection put forward by Ch. Appleton is the following. In that part of the text which he considers as genuine, it is laid down that he who acquires a field by usucaption simultaneously acquires a treasure 'even if he does not know that it lies in his field'. Obviously, the case that he does know it presented no difficulties, usucaption being allowed without question. Now Ch. Appleton claims that the jurists cannot possibly have had in mind here a *thensaurus alienus*, as it would appear from the 'interpolated' passage. He says that, leaving aside the exceptional case of a person erroneously regarding another person's treasure as his own, it is doubtless *furtum* if one removes a *thensaurus alienus* before the period of usucaption is completed. Therefore, he goes on to say, it is not credible that a man, knowing a *thensaurus alienus* is in his field, should ever be able to usucapt it. It would be absurd, he thinks, that one should only have to wait patiently for one or two years and then be rightful owner of a thing which, had one taken it earlier, would have been *res furtiva*. According to him, whilst Brutus, Manilius and Paul spoke of a treasure in the ordinary sense, to wit, of which the ownership is no longer traceable, it was only an interpolator who, misunderstanding them, introduced the *thensaurus alienus*. But all this seems somewhat misleading. It has been stated earlier in this article that, at the period of Brutus and Manilius, a person who possessed a field in the way required for usucaption probably did not commit theft by removing a *thensaurus alienus*, since the treasure was regarded as part of the land; at least in those cases in which field and treasure belonged to a *hereditas iacens* or were abandoned by their owner appropriation was certainly permitted, although carried out in bad faith. Thus there is no reason whatsoever why pre-classical lawyers should not have recognized usucaption of a *thensaurus alienus*. It was different, of course,

Neratius et Proculus et solo animo non posse nos adquirere possessionem, si non antecedit naturalis possessio.

Neratius and Proculus, we are told, deny that possession can be acquired by mere intention.

ideoque si thesaurum in fundo meo positum sciam, continuo me possidere, simul atque possidendi affectum habuero, quia quod desit naturali possessioni, id animus implet.

In this passage the importance of the intention is illustrated. If a treasure lies on my land, I acquire possession by my will to possess it no matter whether or not I actually lay hold on it. This rule, though opened with *ideoque*, does not immediately result from the preceding one, in which emphasis was laid on the requirement of *naturalis possessio*. Possibly part of the discussion has been dropped by the compilers. Neratius and Proculus may have stated that there are cases in which *naturalis possessio* does not exactly mean the physical detention of a thing, but effective control is sufficient. Thus—*ideoque*—if I know about a treasure stored in my field, I need not remove it in order to possess it. No doubt the indirect speech *si thesaurum in fundo meo positum sciam, continuo me possidere* contains the opinion of Neratius and Proculus, recorded by Paul. The following appendix, however, does not seem to represent early or even middle classical law. Neratius and Proculus would hardly have required, in addition to knowledge, a special *possidendi affectus*, this *affectus* being virtually contained in the knowledge in the vast majority of cases. Nor is it likely that it was they who introduced the conception of the *animus* filling up a deficient *naturalis possessio*: it is very probable that, in the case concerned, they did not regard the *naturalis possessio* as deficient in any way, but only gave it a wider meaning. We may, therefore, assume that from *simul atque* to *animus implet* it is Paul who explains the old decision.²⁴ As will be seen, he himself does not entirely agree with it.

in the time of Paul. A treasure was no longer reckoned among the accessories of land, but treated separately. *Usucapio pro herede* and usucaption of abandoned goods had ceased to exist. Consequently, taking away a *thesaurus alienus* now constituted an offence: it was under these circumstances that Paul made the remark, held to be a gloss by Ch. Appleton, that usucaption should not take place even if the holder of the field knows about the treasure. We may observe that there is nothing to justify suspicion in the fact that Paul, though a late classical author, uses *thesaurus* in the older sense of the word. Clearly he comments here upon views expressed by much earlier lawyers, and it is only natural that he adopts their terminology.

²⁴ I am not convinced that the *affectus possidendi* must always be interpolated. On the other hand, however, Ch. Appleton, *loc. cit.* p. 10, goes probably too far when he ascribes to Proculus this requirement of a "special manifestation of the *animus*". It may be noted that the question does not affect the main problem of this article.

ceterum quod Brutus et Manilius putant eum, qui fundum [longa possessione] (usu) cepit, etiam thesaurum cepisse, quamvis nesciat in fundo esse, non est verum: is enim qui nescit non possidet thesaurum, quamvis fundum possideat.

Brutus and Manilius say that he who acquires a field by usucaption²⁵ simultaneously acquires a treasure lying there even if he knows nothing about it. Paul, however, rejects this view since, in his opinion, possession of a field does not *ipso facto* convey possession of a treasure deposited in it. Huvelin claims that *quamvis nesciat in fundo esse* was not in the original *responsum*: ancient jurists, he says, used to be very concise. True, they were. But was it possible to omit the very point of a decision? It should be observed that Brutus and Manilius did not attempt here a general doctrine of possession, though a doctrine certainly underlies and may be derived from their statement.²⁶ They merely settled a particular case which, because of its difficult character, was submitted to them. Obviously the problem was that a person had usucaptured a field in which a treasure was deposited; but throughout the period of usucaption the presence of the treasure had remained unknown to him: was the treasure acquired all the same? Brutus and Manilius said it was, *quamvis nesciat in fundo esse*. It was precisely for this *quamvis nesciat* that the *responsum* had to be delivered, the lawyers doing nothing but make their answer fit the question put to them. In fact this problem, which had already come into notice in the time of Brutus and Manilius, was later solved in a different way. Whilst these two jurists took the archaic view that a treasure is a subordinate part of the land,²⁷ resting their judgment on this objective, visible connexion rather than on elaborate subjective elements of possession, Paul and, as we have seen, Neratius and Proculus held that one cannot possess a treasure if one is not aware of it: and consequently, said Paul, usucaption is not possible in this case. It may be remarked that, since the early times of the Empire, it was even doubtful whether mere knowledge suffices. We shall see that Paul, referring to Sabinus, maintained that possession is not acquired, unless the treasure is actually removed. Clearly, all this goes to show that the questions concerning the *animus possidendi* are traditional, dating from the republican period; and thus one

²⁵ On the change from *usucapio* to *longi temporis praescriptio*, see above, p. 220.

²⁶ Actually Paul does use their decision for illustrating the theory of possession in general.

²⁷ Of course, we cannot be certain that this was a general principle, applicable in all cases.

may say that, even if it was Paul who inserted *quamvis nesciat in fundo esse*, he interpreted the *responsum* correctly. But if a further proof is needed that the clause is older than Paul, the following passage will supply it:—

sed et si sciat, non capiet [longa possessione] (usu), quia scit alienum esse.

Paul observes that usucaption of a *thensaurus alienus* is not only impossible, if I do not know that it lies on my land: it is also impossible if I know.²⁸ I may, indeed, possess it in this case. But I cannot acquire ownership, because I know that it is not mine.²⁹ According to Huvelin, the *responsum* delivered by Brutus and Manilius consisted only of the sentence *is qui fundum cepit etiam thesaurum cepit*; he contends that the words *quamvis nesciat in fundo esse* are Paul's. But if one accepts this suggestion, Paul must have adopted a very strange course. He would first have restricted the tenor of the *responsum*, making it refer only to that case in which the holder of the field knows nothing of the treasure; next he would have stated that, contrary to what the *responsum* says, usucaption does not take place; lastly, however, he would have made an appendix, *sed et si sciat to alienum esse*, merely in order to reinsert that case which he himself had eliminated before and to say that usucaption is here equally impossible. It is difficult to see why the jurist should have proceeded thus. As it stands, the text is easily explained. Brutus and Manilius held that a person, though not aware of a treasure lying in his field, usucapts it by usucapting the field. Paul disagrees, since the *animus possidendi* is missing. In fact, he goes on to say, even if it exists, usucaption cannot be admitted, *mala fides* barring it. But this case was not mentioned by Brutus and Manilius: doubtless they were confident that ownership is here gained. We have already considered the reasons accounting for this divergence. First, Brutus and Manilius did not require *bona fides*, but only excluded *res furtivae* from usucaption. Now it is clear that they treated a treasure as part of the land in which it is found and, therefore, we may suppose that it was never a *furtum* if that person removed the treasure who possessed the field in a way

²⁸ Paul's remark is very brief, indeed, almost abrupt. But this is easily explained. He discusses possession here and not usucaption. The *responsum* of Brutus and Manilius, chiefly regarding usucaption, is only mentioned because it has some bearing on the theory of possession. Therefore, as far as questions are concerned that merely relate to usucaption, Paul does not go into detail.

²⁹ Paul does not take into account the very unusual case where the finder of another person's treasure honestly believes that it is his own.

leading to usucaption.³⁰ Secondly, it has to be noted that *usucapio pro herede* and usucaption of abandoned things were among the most important kinds of pre-classical usucaption. In these cases he who laid hold on the goods always knew that they were not his but, in spite of this, did not commit an offence. All this was, of course, different when Paul composed his commentaries. A treasure was then regarded independently from the field, *bona fides* was required under all circumstances, and so usucaption of a *thensaurus alienus* was no longer allowed.

quidam putant Sabinum sententiam veriore[m] esse nec alias eum qui scit possidere, nisi si loco motus sit, quia non sit sub custodia nostra : quibus consentio.

Sabinus, Paul and several other authorities say that, even if I know that a treasure lies in my field, I am not yet in possession of it; I only possess it, if I have removed it from its original place. It would perhaps be somewhat hasty to generalize this decision and to infer from it that, according to Sabinus and Paul, possession can never be acquired, unless one actually removes the thing in question. It is, *e.g.*, not very likely that, if I buy some chairs and they are put in my garden, I have to convey them to another place in order to possess them.³¹ In the case of a *thensaurus alienus*, presenting some peculiar features, the jurists seem to have required something more than usual. The reason, advanced by Paul, why I do not possess the treasure without removing it is *quia non sit sub custodia nostra*. The word *custodia* has here its literal, untechnical meaning: custody, care, control.³² A *thensaurus alienus*, says Paul, is not under my control as long as it remains where its owner has put it and in a place whence he or those privy to his designs may, at any time, fetch it again. It is only safe if taken away, and only then is the *naturalis possessio* complete.³³

The foregoing remarks on D. 41. 2. 3. 3 certainly leave room

³⁰ Similarly, even if we assume that Brutus and Manilius required *bona fides*, it was no doubt sufficient that there was *bona fides* with regard to the field; in other words, the *bona fides* relating to the field was considered to cover a treasure deposited there.

³¹ This is another argument against Ch. Appleton's view that the original text dealt with a treasure which has no traceable owner, the passage *sed et si sciat ad alienum esse* being interpolated.

³² Possibly this indicates that the argument *quia non sit sub custodia nostra* was already offered by Sabinus at a time when *custodia* was not yet primarily a technical term signifying a certain degree of liability. The fact that the clause *quamvis sit nostra* is indirect speech seems equally to suggest that Paul adopted it from earlier sources.

³³ It must not be forgotten that the jurists are always more careful in recognizing acquisition than continuation of possession. Thus it is not surprising to find that, in the case discussed, the owner's position with regard to the treasure is still strong enough to make it rather difficult for the holder of the field.

for doubt. But one may safely hold that no unprejudiced interpretation can, on the basis of this text, support Huvelin's view that there was a relevant difference under the *lex Atinia* between *res subrepta* and *res furtiva*: such a difference did not exist. Thus, the main argument for his theory that the XII Tables did not forbid usucaption of *res furtivae* loses its weight. As has already been noted, this argument was that, since the *lex Atinia* only mentions *res subreptae*, i.e. things that are actually carried off, the XII Tables cannot have prohibited usucaption of *res furtivae*, including things acquired by fraud. However, he adduces yet another point in support of his proposition. *C'est chez Gaius*, he says, *que les causes et le processus de la confusion apparaissent le plus nettement*. It may be well to quote the passage he refers to, G. 2. 45 and 49:—

Sed aliquando etiamsi maxime quis bona fide alienam rem possideat, non tamen illi usucapio procedit, velut si quis rem furtivam aut vi possessam possideat; nam furtivam lex duodecim tabularum usucapi prohibet, vi possessam lex Julia et Plautia. . . . Quod ergo vulgo dicitur furtivarum rerum et vi possessarum usucapionem per legem duodecim tabularum prohibitam esse, non eo pertinet, ut ne ipse fur quive per vim possidet usucapere possit (nam huic alia ratione usucapio non competit, quia scilicet mala fide possideat), sed nec ullus alius, quamquam ab eo bona fide emerit, usucapiendi ius habeat.

Huvelin points out that the *lex Atinia* is not mentioned in this text. He claims that Gaius ascribes to the XII Tables a provision respecting the *res vi possessae*—*quod dicitur furtivarum rerum et vi possessarum per legem duodecim tabularum prohibitam esse*—although, for all we know, it was only the *lex Julia et Plautia* which dealt with this class of things. Furthermore, he says, Gaius himself admits that his account is based on *quod vulgo dicitur*, on a current but unscientific belief. His conclusion is that Gaius was subject to the widespread illusion that all venerable ancient rules went back to the Code. In actual fact, he says, the XII Tables did not speak of *res furtivae*: the *lex Atinia* was the first to exclude them from usucaption.

If we examine these arguments one by one, we have to begin with the fact that Gaius does not mention the *lex Atinia*. This is no doubt remarkable, and Huvelin is right in saying that also in Justinian's I. 2. 6. 2 the *lex Atinia* was not, originally, referred to. Justinian reads: *nam furtivarum rerum lex duodecim tabularum et lex Atinia inhibet usucapionem*. The singular of *inhibet* still shows that there can only have been one subject.

But the omission of the *lex Atinia* in Gaius and its interpolation in Justinian are rather a weak proof of the assertion that the XII Tables, which are not omitted and not interpolated, are mentioned by mistake. Yet this proof seems so plausible to Huvelin that he regards the *lex Atinia* as interpolated even in D. 41. 3. 33 pr., where it is certainly not. Julian says (libro quadragesimo quarto ad edictum) that *ex qua causa quis ancillam usucaperet, nisi lex duodecim tabularum vel Atinia obstaret, ex ea causa necesse est partum usucapi*. There is no sign of interpolation whatsoever,³⁴ but if there were any, it would not follow that the XII Tables contained no rule on usucaption of *res furtivae* but, on the contrary, that the principle they laid down was considered as more important than the amendment introduced by the *lex Atinia*. It is, however, most improbable that, whilst Brutus, Manilius, P. M. Scaevola, Q. M. Scaevola, Cicero, Sabinus, Cassius, Paul and, if not Justinian, at least an annotator of his Institutiones all cited the *lex Atinia*, Gaius and Julian³⁵ should have forgotten it or denied its relation to usucaption.³⁶ In fact, Julian in D. 41. 3. 33 pr. does cite it. That Gaius, author of a commentary on the XII Tables, only adduces this code, is easily understandable.

According to Huvelin, Gaius wrongly stated that it was the XII Tables which prohibited usucaption of a *res vi possessa*. But supposing he did, it would once more be erroneous to infer that the *res furtiva* also was not dealt with in the XII Tables. Much rather might one say that their provision about *res furtivae* was so essential that the jurists harmonized later rules with the earliest one. Actually, however, Gaius is quite clear as to the respective scope of the XII Tables on the one hand and the *lex Iulia et Plautia* on the other hand. In 2. 45 he states expressly that *furtivam (scil. rem) lex duodecim tabularum usucapi prohibet, vi possessam lex Iulia et Plautia*. True, 2. 49 is not so exact in this respect: *quod ergo vulgo dicitur furtivarum rerum et vi possessarum usucapionem per legem duodecim tabularum prohibitam esse, non eo pertinet, ut nec ipse fur quive per vim possidet usucapere possit, nam huic alia ratione usucapio non competit*. But, obviously, Gaius examines here a matter of

³⁴ Huvelin maintains that Julian would have put an *et*, not a *vel*: why?

³⁵ Justinian I. 2. 6. 2 does not count, being dependent on Gaius. Besides, it is very possible that the words *et lex Atinia* have been inserted by his people; there is nothing which suggests a post-Justinian interpolation.

³⁶ Huvelin emphasizes the fact that both Gaius and Julian belonged to the Sabinian school. But so did Sabinus. Moreover, the differences between the schools seem to me to lie in another field.

detail which is in no way affected by the question whether it is the XII Tables or the *lex Iulia et Plautia* that applies. It is, therefore, not very significant that the minute account of 2. 45 is not repeated in full. Moreover, it has to be remarked that, in 2. 49, the whole case of the *res vi possessae* may well be a supplementary insertion³⁷ made either by Gaius himself or by a glossator. The words *et vi possessorum* look very much like being an appendix to *furtivarum rerum*. Similarly the clause *nam huic usucapio non competit* suggests that, originally, the text referred only to the *fur*: had it been *fur quive per vim possidet* from the beginning, one would rather expect *nam his usucapio non competit*. Anyhow, considering that Gaius, in 2. 45, explains the relation between the XII Tables and the *lex Iulia et Plautia* perfectly correctly, one may prefer to speak of a slip in 2. 49 rather than of *une erreur historique*.³⁸

The third and last of Huvelin's arguments is that, when Gaius relates the history of usucaption, he does not render scientific tradition but, as indicated by the phrase *quod vulgo dicitur*, a common, unreliable rumour. But this proposition also cannot be accepted. In 2. 45 Gaius says, distinctly and without any reservation, that usucaption of a *res furtiva* is forbidden by the XII Tables, of a *res vi possessa* by the *lex Iulia et Plautia*. Thus the words *quod vulgo dicitur* in 2. 49 can hardly import that the origin of these rules is doubtful. What Gaius wants to bring out is something entirely different, concerning not the origin but the precise extent of these rules. He means that the usual formulation, namely, that usucaption of *res furtivae* and *res vi possessae* is excluded by the XII Tables and the *lex Iulia et Plautia*, is somewhat vague. Naturally enough, the layman would take it that these provisions had also, and even primarily, regard to the thief or the ejector himself. Gaius, therefore, thinks it necessary to remind his pupils that a thief and an ejector are prevented from usucaption on the ground of their *mala fides*, no special laws being required. It must not be forgotten that the lay interpretation which Gaius sets right was correct at a time when usucaption was not yet conditional on *bona fides*.

³⁷ Cp. F. Kniep, *Gai Institutionum commentarius secundus*, §§ 1—96, p. 17, n. 2.

³⁸ On the 'Exactitude of Gaius', see W. W. Buckland, *Reflections Suggested by the New Fragments of Gaius*, *Juridical Review*, December, 1936, pp. 354 *et seq.* Prof. Buckland's conclusion, p. 364, is 'that Gaius is far from an exact writer, and that inferences that passages are interpolations or glosses which have slipped into the text, drawn from looseness or inaccuracy of language, are unjustified'. We may add, in this connexion, that it is similarly unjustified to use small points with regard to which Gaius seems to differ from the main bulk of the sources as the basis for important historical conclusions.

We have seen so far, first, that there is no legal difference between *res furtiva* and *res subrepta*, and, secondly, that the XII Tables as well as the *lex Atinia* dealt with the usucaption of this group of things. Consequently, in addition to the question what was the kind of reform established by the *lex Atinia*, we have now to consider another problem: why did the *lex Atinia* speak of *subripere*, if the XII Tables had spoken of a *res furtiva*?

This second problem does not create much difficulty. It is by no means certain that the XII Tables actually used the expression *res furtiva*. Nowhere is the rule in question quoted literally. The fact that, according to Roman jurists, the XII Tables prohibited *rerum furtivarum usucapionem* is no adequate evidence: they do not pretend that exactly these words were employed. Moreover, the same jurists say the same of the *lex Atinia* which, as is clear from the *Noctes Atticae* of Gellius, had *subripere*.³⁹ In fact, it will be shown that, very probably, the XII Tables did not refer to the stolen thing at all, but only to the thief. Thief in Latin is *fur*, and so it is easily seen how the jurists came to speak of *res furtiva* in connexion with this rule. Again, the *lex Atinia*, when laying down that a stolen thing should not be usucaptured till it had returned to him from whom it was stolen,⁴⁰ had necessarily to find a verb in order to express 'he from whom it was stolen'. But there was no convenient derivative of *furtum* by means of which a clause like *is cui subruptum est* could be formed. This is the simple reason why *subripere* was chosen, although the XII Tables had *fur* or even *res furtiva*.

As to the question, raised at the beginning of this article, what was the material relation between the XII Tables and the *lex Atinia*, Th. Mommsen's opinion seems still worth while considering. He holds⁴¹ that, whilst the XII Tables debarred from usucaption only the thief himself, the *lex Atinia* debarred one who buys the stolen thing. Huvelin rejects this view. There is nothing to show, he says, that the *lex Atinia* applied exclusively to a man who obtains goods stolen by someone else: the text of the law makes it evident that it covered all cases in which a thing is *subruptum*. This is correct but, nevertheless, Th. Mommsen's theory holds good, in a slightly different form. That the XII Tables only prohibited usucaption by the thief himself is probable for several reasons. Buying and selling in that age

³⁹ For references, see Huvelin, pp. 256 *et seq.*, 259 *et seq.*, 269 *et seq.*

⁴⁰ According to the interpretation of the classical lawyers, the return must be to the *dominus*; see D. 41, 3, 4, 6 (Paulus libro quinquagensimo quarto ad edictum).

⁴¹ *Römisches Strafrecht*, p. 756, n. 1.

were more or less done in public. In most cases, therefore, a stolen thing would not be transferred, and it was perfectly sufficient to prevent the actual thief from gaining ownership. Moreover, it seems most likely that the *lex Atinia*, of very wide scope indeed, was preceded by some less general provision. Of course, precise reconstruction of a lost text must always remain guesswork. It should, however, be observed that the XII Tables in addition to the rule *adversus hostem aeterna auctoritas*,⁴² may well have had another similar one: *adversus furem aeterna auctoritas*. However this may be, there came a stage when the need was felt of an efficient safeguard against alienation by the thief, and against acquisition by a third party, of stolen goods. It was then that the *lex Atinia* was enacted, with the purpose of excluding usucaption also by a person other than the thief. Only this law was not, as Th. Mommsen thinks, entirely independent of the principle laid down by the Code. In other words, Huvelin is right in assuming that the *lex Atinia* did not merely apply to him who obtains things stolen by someone else, leaving the thief to the XII Tables. It took up the ancient rule and enlarged it. Whilst under the XII Tables the thief alone could not usucapt, the *lex Atinia* said that a stolen thing is not capable of usucaption, no matter who has it, so long as it has not returned to that person who possessed it before the theft was committed.⁴³ All this is somewhat hypothetical: but there is a passage in Gellius, Noctes Atticae 17. 7, which may be adduced in support:

Legis veteris Atiniaie verba sunt: Quod subruptum erit, eius rei aeterna auctoritas esto. Quis aliud putet in hisce verbis quam de tempore tantum futuro legem loqui? Sed Q. Scaevola patrem suum et Brutum et Manilium, viros adprime doctos, quaesisse ait dubitassequ, utrumne in post facta modo furta lex valeret an etiam in ante facta: quoniam subruptum erit utrumque tempus videretur ostendere tam praeteritum quam futurum. Itaque P. Nigidius, civitatis Romanae doctissimus, super dubitatione hac eorum scripsit in tertio vicensimo grammaticorum commentariorum. . . .

We need not quote here the learned *exposé* of P. Nigidius, who only considers the philological aspect of the matter. Clearly, for the jurists mentioned in this text the question what is the significance of *subruptum erit* was, above all, a practical one: they asked whether or not the *lex Atinia* should be of retroactive

⁴² 3, 7.

⁴³ Thus one may, perhaps, suppose that the *lex Atinia* had *dum* or *dum non* or *dum ne revertatur* rather than Huvelin's *nisi*. The innovation consisted in the very fact that usucaption was now impossible, not only for the thief himself, but right up to the moment in which the thing returns to its previous holder.

effect.⁴⁴ According to Huvelin, the *lex Atinia* was the first law to forbid usucaption of a *res subrepta*. If so, it will be difficult to explain how the idea of retroaction could ever arise. The economic and social implications would have been monstrous in this case. Besides, retroaction would have involved expropriation on a large scale, since no doubt a good many people were in possession of things which, though *res subreptae*, had been lawfully acquired under the former régime. But, not to mention the difficulties that would have been found in taking these things away from their present holders and ascertaining the legitimate owners, it is hardly believable that P. M. Scaevola and his contemporaries should have thought of an expropriation at all.⁴⁵ The whole discussion becomes intelligible, if one takes the line suggested above. Whilst the XII Tables were solely directed against the actual thief, the *lex Atinia* excluded from usucaption the stolen object as such. Thus, when P. M. Scaevola asked *utrumne in post facta modo furta lex valeret an etiam in ante facta*, he did not ask whether goods which, long before, had been lawfully acquired should now be confiscated as *res furtivae*. It was the extension of the ancient rule, it was the new element in the *lex Atinia*, with which the first interpreters had to deal and with regard to which the question of retroaction was raised. The innovation consisted in the fact that, from this time onwards, not even a third person should be allowed to usucapt anything stolen or, in the words of the law, anything *quod subruptum erit*. But here, indeed, there was some ambiguity. This much was certain that, if goods were stolen in future, neither the thief nor anyone else could ever usucapt them. But there was one difficult case: what if a thief did not sell some object till after the law was promulgated and yet had stolen it before? The purchaser would contend that *quod subruptum erit* means the same as *quod subripietur*,⁴⁶ referring only to goods

⁴⁴ The passage in Gellius thus shows that the *lex Atinia* is not much older than Brutus, Manilius and P. M. Scaevola. These jurists would not have dealt with the question of retroaction, if the law had existed for a long time past. It has been suggested recently that the *lex Atinia* dates from 240 B.C. But the evidence proves that this cannot be the case; see P. F. Girard, *Manuel Élémentaire de Droit Romain*, 7th ed. p. 321, n. 5.

⁴⁵ It may, incidentally, be observed that, as Huvelin himself points out. pp. 260 *et seq.*, P. Nigidius is to be regarded as the real author of this text rather than Gellius. Now P. Nigidius, who was praetor in 58 B.C., some generations before Sabinus, calls the act of *subreptio* a *furtum* and has it called so by P. M. Scaevola, Brutus and Manilius: the question concerning *subruptum erit* was, according to him, *utrumne in post facta modo furta lex valeret an etiam in ante facta*. It is clear that he at least did not make a distinction between *res furtiva* and *res subrepta*.

⁴⁶ The grammatical argument for this view would be, according to Gellius: *si dividas separetque duo verba haec subruptum et erit, et sic audias subruptum*

stolen at a later date—to *post facta modo furta*—and that, therefore, he is entitled to usucaption no less than he would have been before the law. On the other hand, he from whom the thing was stolen would claim to be protected under the new system. He would maintain that, strictly speaking, the words *quod subruptum erit* cover each and every thing that is *subruptum* no matter when the theft was committed.⁴⁷ Consequently, he would say, even if it be a question of goods stolen before the law was enacted—of *ante facta furta*—provided they are bought afterwards, they cannot be usucaptured. It is obvious that this kind of retroaction would not result in any economic disadvantages nor, for that matter, in any expropriation. As to usucaptions completed between the XII Tables and the *lex Atinia*, they would all be valid; and, in the case outlined, the purchaser would not lose ownership of the stolen thing, but would merely not acquire it. In fact, the issue so stated may well have attracted the attention of the leading lawyers of that time and it is perfectly understandable that they hesitated to decide it either way.⁴⁸ We may note in conclusion that, in its whole structure, the problem concerning the clause *quod subruptum erit* is very similar to those questions which M. A. Seneca the rhetor discusses in his *Disputationes*. There is, however, one remarkable difference. Whereas P. M. Scaevola, Brutus and Manilius, of the second century B.C., examine a particular question of practical importance, the numerous cases dealt with by M. A. Seneca, about a century later, are all imaginary, though, of course, the actually existing law has had some influence on the invention.⁴⁹

(erit) tanquam certamen erit aut sacrificium erit, tum videbitur lex in postfuturum loqui.

⁴⁷ Si vero copulate permixteque dictum intellegas, ut subruptum erit non duo, sed unum verbum sit idque unitum patiendi declinatione sit, tum hoc verbo non minus praeteritum tempus ostenditur quam futurum.

⁴⁸ Q. Scaevola says *patrem suum et Brutum et Manilium quaesisse dubitasseque*. Unfortunately, we know nothing about the outcome of the discussion.

⁴⁹ I should like to mention that, although Huvelin's view on *furtum proprium* and *furtum improprium* cannot be accepted, his *Études sur le Furtum* are without doubt among the most brilliant monographs written on a Roman Law subject. As Ch. Appleton, *loc. cit.*, p. 12, n. 19, points out, Huvelin himself seems finally to have given up the theory combated in this article. I am much indebted to Professor W. W. Buckland and to Mr. P. W. Duff for valuable criticism and suggestions.

SIR FREDERICK POLLOCK.

BY the death of Sir Frederick Pollock at the age of ninety-one, we have lost a great master of the Common Law, an expert in jurisprudence and a polished stylist in legal literature. He had reached the allotted three score years and ten before most of the readers of this Journal were born, but, to the end, his brilliant mind was undimmed and until a year ago scarcely any of his activities were contracted.

The books by which he is chiefly known to students are the Principles of Contract, which was first published in 1876, the Law of Torts which appeared eleven years later, and the First Book of Jurisprudence (1896). They came as a revelation in graceful exposition of the topics with which they dealt. Hitherto there had not been a single book on contract or on tort which aimed at anything higher than reliability. Any one who approached the law through works like those of Addison, Leake and Chitty found himself among well-labelled specimens in an orderly museum instead of in contact with the pulsating warmth and energy of the humanism upon which the Common Law rests. Sir Frederick was the last of several writers who, in his generation, showed that it was possible to make a book about law readable by a scholar. Contemporaries of his who had the like gift were Maitland, Dicey, Oliver Wendell Holmes and Kenny, and all are now gone.

In 1885, the Law Quarterly Review began its career with Sir Frederick (then Mr.) Pollock as its editor. It was not the first effort of its kind, but none of its predecessors attained such a reputation both in England and overseas. For fifty-two years it has been, and still is, the literary *palaestra* for the young researcher and the arena for the proved gladiator. It is significant that two years later the Harvard Law Review began its distinguished career and that the form of the Cambridge Law Journal has throughout been modelled to a large extent on the Law Quarterly.

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Published Annually by the Cambridge University Law Society.

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NOTES ON RECENT CASES.

CONFLICT OF LAWS—DIVORCE—INABILITY OF WIFE TO ACQUIRE A DOMICIL DIFFERENT FROM THAT OF THE HUSBAND DURING COVERTURE—JURISDICTION OF COURT—DESERTION AND UNDEFENDED SUIT NO EXCEPTION TO GENERAL RULE.

Herd v. Herd. [1936] P. 205.

WIFE's petition for the dissolution of the marriage on the ground of the adultery of the husband.

The parties were married in England in 1905. Their domicile of origin was English and their matrimonial home was in England. In 1923 the husband left his wife and went to the United States, where he remained. He wrote to his wife and her solicitors that he had 'no present intention of returning to Great Britain'. Furthermore he had become a naturalized American citizen, the procedure for which had necessitated a declaration in writing of his intention of permanently residing within the United States.

On the above facts Bucknill J. held that the husband had lost his domicile of origin and had acquired a domicile of choice in the State of New York; that the domicile of his wife was consequently American; and that therefore an English Court had no jurisdiction to dissolve the marriage.

The importance of this case lies in the decision of the Court with regard to its jurisdiction in suits for the dissolution of marriage. The general rule of law in this matter was stated to be found in the words of Lord Merrivale in *H. v. H.* [1928] P. 206, 212: 'Under British law the jurisdiction to decree divorce depends on domicile; the domicile of the husband determines the domicile of the wife; and that independent authority to decree divorce cannot, consistently with English law, co-exist at the same time in two sovereign states.' The learned judge therefore held that the Court had no jurisdiction to grant the decree.

In the course of his judgment Bucknill J. dealt with the *dicta* of the Court of Appeal in *Ogden v. Ogden* [1908] P. 46 with regard to cases in which the wife has been deserted by her husband in the country of the domicile. There it was said that the wife might sue notwithstanding the fact that the husband had left the country intending to change his domicile. The reasoning was based on one of two grounds: either (1) the husband cannot be heard to say that he has changed his domicile, or (2) that the wife must be allowed *ex necessitate* to treat the country of the previous domicile as still being the country of her domicile. Three later cases, however, precluded adherence to the above *dicta*. In the first place as regards (2) such an argument was inconsistent with the reaffirmation in *Lord Advocate v. Jaffrey* [1921] 1 A. C. 146 of the principle that the wife's domicile follows that of the husband throughout coverture and desertion does not enable her to acquire a separate domicile. Nor does a

judicial separation make any difference to this rule (*Att.-Gen. for Alberta v. Cook* [1926] A. C. 444). With regard to the suggestion that the husband is precluded from asserting a change of domicile, the judgment of Lord Merrivale in *H. v. H.* [1928] P. 206 expressly repudiated this, as he held that even where a judicial separation had been obtained the husband could protest the jurisdiction of the Court on the ground that he had changed his domicile.

The present case differed from *H. v. H.* in that it was undefended, but the learned judge had no hesitation in laying down the rule that the Court had no jurisdiction as the husband was not domiciled here.

This case is curious in that the two cases of *Stathatos v. Stathatos* [1913] P. 46 and *Montaigu v. Montaigu* [1913] P. 154, where the dicta of Sir Gorell Barnes in *Ogden v. Ogden* were directly applied and a decree granted in spite of the husband's domicile abroad, do not appear to have been cited in the present case; indeed Bucknill J. says 'no reported case was brought to my notice in which the Divorce Court has decreed the dissolution of a marriage in a case in which the husband was domiciled abroad'. Both these cases were undefended. Consequently there may still be some slight doubt whether the Court will not grant a decree in undefended suits. All the cases relied upon by Bucknill J. were contested cases with the exception of the Privy Council case of *Att.-Gen. for Alberta v. Cook*. It would therefore still seem open to the House of Lords to say that in undefended suits the Court will grant the decree to the wife where the last matrimonial domicile is English even though the husband is domiciled abroad. Such a decision, even if not contrary to the actual decisions in the above cases, would, it is submitted, be inconsistent with their *rationes decidendi*, and the law may be taken to be settled that there is no such exception.

A. LL. A.

CONSTITUTIONAL LAW—POLICE—PUBLIC MEETING IN STREET—POLICE ARE UNDER DUTY TO PREVENT BREACH OF PEACE WHICH THEY REASONABLY APPREHEND.

Duncan v. Jones. [1936] 1 K. B. 218.

ON July 30, 1934, D., the appellant, and others collected in a street opposite an unemployed training centre, with the published intention of holding a meeting to defend freedom of speech and the right of assembly. A box was placed in the roadway. D. attempting to mount this was told by J., the respondent, a police officer, that the meeting must not be held there but that it could move to a neighbouring street. D. refused to obey, mounted the box and began to address the meeting. Whereupon she was arrested, offering no resistance.

Under the Prevention of Crimes Act, 1871, s. 12, as amended by the Prevention of Crimes Amendment Act, 1885, s. 2, D. was accused and convicted of unlawfully and wilfully obstructing a police officer in the execution of his duty. It was not contended that there had been any obstruction of the highway, other than the box, or that any person present had committed or incited a breach of the peace.

Upon appeal to quarter sessions it was admitted that D. on May 25,

1933, had held a similar meeting resulting in a considerable disturbance inside the training centre: for this reason the police had feared a recurrence of the incident in 1934. The appeal being dismissed a case was stated for the Divisional Court. They dismissed the appeal.

D. contended that she did not obstruct J. in the execution of his duty inasmuch as it is not unlawful to hold a meeting in a public way, nor have the police a right to prevent a person doing a lawful act, because they apprehend a breach of the peace. In *Beatty v. Gillbanks* (1882) 9 Q. B. D. 308 it was held that a person could not be convicted of unlawful assembly although by assembling he was likely to cause a breach of the peace on the part of others. It was urged that D. was not responsible for those causing the disturbance in May 1933 (*R. v. Londonderry Justices* (1891) 2 L. R. Ir. 440, 450). *Dicey's Law and Custom of the Constitution*, 8th ed. p. 508 was also quoted.

J. pleaded that 'if a police officer reasonably apprehends a breach of the peace it is his duty to prevent it' (Bramwell J. in *R. v. Prebble* (1858) 1 F. & F. 325). If this had been the case in *Beatty v. Gillbanks* the appellants there would have been rightly convicted of obstructing a police officer.

Lord Hewart C.J. drew attention to the *dicta* of Field J. in *Beatty v. Gillbanks*, that a person is presumed to intend the consequences of his own acts and must be held liable for them. But he thought *Beatty v. Gillbanks* apart from the present case. He agreed with the view of Bramwell J. in *R. v. Prebble* and thought that the incident of May 1933 had given ground for reasonable apprehension of a breach of the peace. He therefore considered that D. had been rightly convicted of obstructing a police officer in the execution of his duty.

Humphreys and Singleton J.J. concurred.

It has been said that this case is a contradiction of *Beatty v. Gillbanks*. But this is not so, although the state of the law may be obscured. In *R. v. Prebble* and the present case it was held to be the duty of a police officer to prevent a breach of the peace upon reasonable apprehension, while in *Beatty v. Gillbanks* it was decided it was not unlawful assembly, to assemble knowing that a breach of the peace by others might be the result. D. was not convicted of unlawful assembly but of obstructing a police officer in the execution of his duty. So the law now is that it is the duty of a police officer to prevent a breach of the peace if he reasonably apprehends it, and it is an offence to obstruct him in the execution of that duty.

M. D. W.-J.

CONTRACT—ACTION WHETHER FOUNDED ON CONTRACT OR TORT—COSTS—
COUNTY COURTS ACT, 1919, s. 11.

Jarvis v. Moy, Davies, Smith, Vandervell & Co. [1936] 1 K. B. 399.

J. SUED the defendants, a firm of stockbrokers, 'for damages for breach of contract arising out of the defendants' relationship with the plaintiff as stockbrokers and client'. J. had given certain instructions to the defendants. They did not carry them out.

J. recovered £60 damages in the High Court. Under the County Courts Act, 1919, s. 11 (now the County Courts Act, 1934, s. 47), if the plaintiff brings an action in the High Court which he could have commenced in the county court, he can get costs only on the (comparatively low) county court scale if damages between £50 and £10 are awarded for 'an action founded on tort' or between £100 and £40 for 'an action founded on contract', unless in either case a judge of the High Court certifies that there was sufficient reason for bringing the action in that Court. Horridge J. in giving judgment for J. had said that the action could have been brought in the county court. The Taxing Master held the action was 'founded on contract', and, as J. had recovered less than £100, his costs were assessed on the county court scale. J. appealed against this order on the ground that the action was 'founded on tort' and that, as he had recovered more than £40, the costs ought to have been on the High Court scale. The Court of Appeal dismissed the appeal.

Greer L.J. admitted that the original averment of contract in the statement of claim did not in the least prejudice this later claim of tort. Counsel for J. had relied largely on *Brown v. Boorman* (1842) 3 Q. B. 511 and (1844) 11 Cl. & F. 1, where an oil broker had been successfully sued in an action on the case for mismanaging a contract; but Greer L.J. considered the decision as having no bearing on the interpretation of the Act of 1919. He said (at p. 405): 'The distinction in the modern view, for this purpose, between contract and tort may be put thus: where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is tort, and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract. Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract.'

Slesser L.J., while reaching the same decision, did not put aside altogether the older authorities. In *Brown v. Boorman* the rule was laid down that 'wherever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the plaintiff may either recover in tort or in contract' (11 Cl. & F. at p. 44). Slesser L.J. said: 'If that view is to be taken without qualification it would follow that every action for breach of duty which developed from a contract could be brought in tort; but as I understand the later cases, we have now to look at the substance of the transaction' (p. 406). Now there are some callings whose followers owe a duty to the public independently of any contract, and if they perform a contract negligently, it is still open to the sufferer to sue in tort. In the report of *Brown v. Boorman* in the Exchequer Chamber (3 Q. B. at p. 525) Tindal C.J. gives a list of these callings. He names common carriers, attorneys, surgeons 'and other professional men'. *Brown v. Boorman* itself included an oil broker as a professional man. Slesser L.J. distinguished a stockbroker from an oil broker on the ground that the duties of the latter were subject to regulations by statute. 'Such a broker cannot be deemed to include the business of a stockbroker. In my opinion a stockbroker does not exercise a "public calling" in the sense in which that term is applied to carriers and certain other occupations' (p. 407).

C. F. C.

CONTRACT—ILLEGALITY—PROMISE NOT TO DISCLOSE KNOWLEDGE OF MISDEMEANOUR HELD NOT TO BE AGAINST PUBLIC POLICY UNLESS AFFECTING DUTY TO GIVE EVIDENCE IN A COURT OF LAW—BREACH OF CONTRACT—DAMAGE DUE TO PLAINTIFF'S OWN FAULT.

Howard v. Odhams Press, Ltd. [1936] 2 All E. R. 40; 155 L. T. 20.

H. was employed by the defendants to sort letters sent in by the public in competitions initiated in their newspapers. He left their employment in 1932 and thereafter the defendants discovered that prizes were being won in their competitions by resort to unfair means and that H. was concerned in these frauds. He admitted his complicity and signed a statement describing the working of the scheme but he did this only on the express condition that the statement was not to be divulged to any third party or to be used in any way against him. His object was to prevent information reaching his trade union which would cost him his membership and the consequential loss of all chance of employment till he was reinstated. He also then and at a later date promised to assist the defendants in detecting the swindlers, in return for a promise of pecuniary aid and possible employment.

At a later date, the plaintiff wrote to the defendants demanding money and employment which, he alleged, they had promised him, and he threatened to make the whole matter public. They handed the statement to the plaintiff's union, which thereupon deprived him of his membership, with resulting loss estimated at £400.

The defendants, in answer to an action brought by the plaintiff for breach of contract, alleged that they were justified because (1) the last letter from the plaintiff was in the nature of blackmail; (2) the plaintiff had not disclosed the whole facts known to him. Both defences were rejected as (1) the threat of publicity did not warrant divulgence of the matter by the defendants, for the plaintiff on his part was not bound to secrecy, and, moreover, he genuinely believed that he had a grievance; (2) the plaintiff's promise of assistance was independent of the promise of secrecy by the defendants.

The main question at issue was whether the agreement not to divulge was void as being contrary to public policy. Porter J. held that the mere concealment of a misdemeanour was not in itself unlawful or against public policy; that *Lound v. Grimwade* (1888) 39 Ch. D. 605 did not apply, as there was no payment for the non-disclosure of the crime or for concealment from the union; that the test, even in the case of a misdemeanour, was whether the purpose of the agreement was to prevent the defendants from giving evidence in Court, if summoned by legal process (*Crampton v. Green* (1848) 10 L. T. 442), or whether it was merely an agreement not to take the initiative to divulge the information in the first instance. As the statement, in the opinion of the Court, did not purport to prevent the defendants from giving evidence in a law Court, the contract was valid and therefore binding on the defendants.

In awarding damages, the Court applied the principle enunciated in *Weld-Blundell v. Stephens* [1920] A. C. 956 and extended in *Bradstreets British, Ltd. v. Mitchell and Carapanayoti & Co., Ltd.* [1933] Ch. 190, holding that although the plaintiff suffered loss through the breach of the promise, he was entitled to only nominal damages because the loss was

in substance the result of his own wrongdoing, the act of the defendants being the occasion and not the cause of the plaintiff's loss.

E. A. L. B.

CONTRACT—MISREPRESENTATION—RESCISSION—REPRESENTATION BY VENDOR TRUE WHEN MADE—CIRCUMSTANCES CHANGED BEFORE CONTRACT SIGNED—CONTINUED REPRESENTATION—VENDOR HELD BOUND TO DISCLOSE CHANGE OF CIRCUMSTANCES, WHETHER CONTRACT *UBERRIMAE FIDEI* OR NOT.

With v. O'Flanagan. [1936] Ch. 575.

NEGOTIATIONS were started in January 1934 between the plaintiff and the defendant, doctors, for the sale of the plaintiff's practice. The defendant stated and it was admitted that the practice was then worth £2,000. The contract was signed in May. Between these dates the defendant had been away ill at intervals and the practice fell off to £5 per week. This was an action to rescind the contract.

Bennett J. held that *Traill v. Baring* (1864) 4 De G. J. & S. 318, 329, where rescission was allowed in similar circumstances in a contract of insurance, applied only to cases *uberrimae fidei*, which this was not. The representations in this case were representations of existing facts which were true when made and could never become untrue. It was an ordinary case of parties to a contract having to prove that they had acted upon representations of existing facts false when made, in order to obtain rescission. He dismissed the action. The plaintiff appealed.

The Court of Appeal unanimously reversed the decision of Bennett J. Lord Wright M.R. said the matter might be put in two ways. It might be based on a duty to communicate the change of circumstances. The Court held that a representation need not be strictly accurate, but if it was not substantially correct then the Court found itself in the range of misrepresentation and had to give effect to that legal position, if it was satisfied that the plaintiff acted upon the representation in concluding a bargain, and it was not in doubt upon that question in this case. He quoted Fry J. in *Davies v. London Marine Insurance Co.* (1878) 8 Ch. D. 469, 475: 'So, again, if a statement has been made which is true at the time, but which during the course of the negotiations becomes untrue, then the person who knows that it has become untrue is under an obligation to disclose to the other the change of circumstances.' He also quoted Turner L.J. in *Traill v. Baring* (at p. 329): 'I take it to be quite clear, that if a person makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the party making the representation, but not to the knowledge of the party to whom the representation is made, and are so altered that the alteration of the circumstances may affect the course of conduct which may be pursued by the party to whom the representation is made, it is the imperative duty of the party who has made the representation to communicate to the party to whom the representation has been made, the alteration of those circumstances; and that this Court will not hold the party to whom the representation has been made bound unless such a communication has been made.'

Alternatively, Lord Wright thought, the matter might be put in

another way, on the ground that a representation made as a matter of inducement to enter into a contract is to be treated as a continuing representation. Lord Cranworth said in *Smith v. Kay* (1859) 7 H. L. C. 750, 769, of a representation made in negotiations some time before the date of a contract: 'The representation does not end for ever when the representation is once made; it continues on.' It is because of this and the fact that the Court may be satisfied that it remained operative in the mind of the representee that the Court holds that in such circumstances the representee shall not be bound. Bennett J. was held to be wrong in thinking that *Traill v. Baring* applies only to contracts *uberrimae fidei*.

W. B. S.-L.

CONTRACT—PERSONAL SERVICE—INJUNCTION—FILM ARTIST—COVENANT NOT TO PERFORM FOR OTHERS UPHeld BY INJUNCTION—DAMAGES AS ALTERNATIVE REMEDY HELD TO BE INAPPROPRIATE.

Warner Brothers Pictures, Incorporated v. Nelson. [1937] 1 K. B. 209.

THE plaintiffs, film producers in the United States, claimed an injunction against Mrs. Nelson, professionally known as Bette Davis, a film artist, to restrain her within the jurisdiction of the Court, 'during the currency [of her contract with the plaintiffs] from rendering without the written consent of the plaintiffs . . . any services for or in any motion picture or stage production or productions of' any other firm, person or corporation. Branson J. granted the injunction.

In December 1934 the defendant contracted with the plaintiffs in the United States for fifty-two weeks (which the plaintiffs might extend to 1942, by exercising the options provided therein) 'to render her exclusive services as a motion picture and/or legitimate stage actress' to the plaintiffs and to perform exclusively for them. A negative stipulation provided that she would not during the contract 'render any services for or in any other phonographic, stage or motion picture production or productions or business of any other person . . . or engage in any other occupation without the written consent of the producer being first had and obtained'. If the defendant failed to perform her services under the contract, the plaintiffs might extend it for a period corresponding with her failure to perform.

In 1936 the defendant admittedly violated the contract by coming to England and making a fresh contract with a third party at a higher salary.

It was conceded that our Courts will not enforce a positive covenant of personal service. Here specific performance of the positive covenants by the defendant to serve the plaintiffs was not claimed. Branson J. said that the practice of the Court of Chancery in relation to the enforcement of negative covenants was stated by Lord Cairns in the House of Lords in *Doherty v. Allman* (1878) 3 App. Cas. 709, 719: 'My Lords, if there had been a negative covenant, I apprehend, according to well-settled practice, a Court of Equity would have had no discretion to exercise. If parties for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case

the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or injury; it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves.'

In *Lumley v. Wagner* (1852) 1 De G. M. & G. 604 the principle was applied to such a case. The Court considers the form and not the substance of the contract and an injunction will not be granted in the case of a contract to enforce negative covenants if the effect would be to drive the defendant to starvation or to specific performance of the positive covenants.

The conclusion to be drawn from the authorities is that, where a contract of personal service contains negative covenants the enforcement of which will not amount either to a decree of specific performance of the positive covenants of the contract or to the giving of a decree under which the defendants must either remain idle or perform those positive covenants, the Court will enforce those negative covenants; but this is subject to a further consideration. An injunction is a discretionary remedy and the Court in granting it may limit it to what the Court considers reasonable in all the circumstances of the case.

An injunction was here available because of the restricted form demanded. It would not keep the defendant idle. Nor were damages suitable, for the uncontradicted evidence of the plaintiffs showed the extreme difficulty of assessing them.

T. R. W.

CRIMINAL LAW—DEFAMATORY LIBEL—TRIVIAL LIBEL UNLIKELY TO DISTURB PEACE, OR SERIOUSLY TO REFLECT ON CHARACTER, OUGHT NOT TO BE PROSECUTED—PROSECUTION NEED NOT PROVE PROSECUTOR UNUSUALLY LIKELY TO BE PROVOKED.

R. v. Wicks. (1936) 25 Cr. App. R. 168.

W. APPEALED against a conviction for publishing a defamatory libel concerning G. The libel was addressed to one Chapman, who had at that time been arrested and charged with criminal offences on the prosecution of the Sun Life Assurance Company, to which G. acted as solicitor. The appeal was dismissed.

W.'s counsel submitted three defences: (1) That the essence of criminal libel is a tendency to cause a breach of the peace and that in the present case the words used were not sufficiently provocative to make a breach of the peace likely. (2) That this occasion was privileged; either absolutely, as being in the nature of a proof of evidence to be given by the appellant as a possible witness in Chapman's defence, or qualified, as W. and Chapman had a common interest in the subject-matter. (3) That there was not sufficient evidence from which the jury could infer that W. knew the libel to be false.

The Court held that as there had been no plea of justification on the part of W., the allegations must therefore be taken to be false. On the point of breach of the peace, the Court held that, although a criminal

prosecution ought not to take place when the libel is so trivial as to be unlikely to cause a breach of the peace, yet, 'There is, . . . in our judgment, no ground for the suggestion made at the Bar that it is incumbent upon the prosecution to prove that the libel in question would have been unusually likely to provoke the wrath of the person defamed, or that the person defamed was unusually likely to resent an imputation on his character' (p. 173). The Court approved a *dictum* of Mansfield C.J. in *Thorley v. Lord Kerry* (1812) 4 Taunt. 355 at p. 364: 'There is no doubt that this was a libel . . . because though the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt and ridicule.'

As to the contention that the letter was published on an occasion which was either absolutely privileged, or the subject of qualified privilege, the Court upheld the ruling of the Recorder that the occasion was in no way privileged. W. had written the letter to a man in whose affairs he had no interest. The slender link that they had both come into conflict with the Sun Assurance Company would not in any way authorize such a publication about a third person.

Lastly, as regards the contention that the indictment could not stand since there was no evidence that W. knew the libel to be false, the Court agreed that it is for the prosecution to satisfy the jury that the defendant has such knowledge, but saw no reason for suggesting that in this case the prosecution had not fully discharged that burden. The falsity of a libel is to be presumed, and, in the absence of a plea of justification, cannot be questioned. There was no question of misdirection in the summing-up of the Recorder—'Did the defendant know those words to be false? Members of the jury, he has not attempted to prove them. It stands out before you quite clearly. In these circumstances have you any difficulty in your minds about arriving at the conclusion that he knew them to be false?'

J. C.

CRIMINAL LAW—EVIDENCE—SIMILAR ACTS BY PRISONER—MURDER—
 DELIBERATE KNOCKING DOWN OF WOMAN BY MOTOR CAR—SIMILAR
 ATTACKS ON OTHER PERSONS—ADMISSIBILITY.

R. v. Mortimer. (1936) 25 Cr. App. R. 150.

THE Court of Criminal Appeal dismissed M.'s appeal against his conviction for murder. On the morning of August 8, 1935, M. knocked down a Miss Oakes, when she was riding her bicycle, by deliberately driving a motor car at her. She died and M. was convicted of her murder. Evidence was called to show that on August 7 M. had knocked down two other women cyclists in a similar way, and had stopped his car and assaulted them. Evidence was also given that on the afternoon of August 8 he had knocked down another woman cyclist and had stolen her handbag, and that he had subsequently driven straight at three different parties of police officers who had tried to stop the car. Objection was taken to the tendering of the above evidence, but it was overruled.

The defence contended that evidence as to incidents which happened

before and after the occurrence which was the subject of the charge should not be admitted unless the other evidence established a *prima facie* case against the accused person.

The Court of Criminal Appeal quoted with approval the rule laid down by Lord Herschell in *Makin v. Att.-Gen. for New South Wales* [1894] A. C. 57 at p. 65: 'The mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.'

It was of crucial importance to show that what was done in relation to Miss Oakes was intentionally done. If the defence was to be, as it had been in one of its aspects, that what had been done amounted to no more than manslaughter, it was manifestly fundamental to establish the guilty intent of the prisoner either to kill, or to cause grievous bodily harm. The evidence objected to was of the very kind which in such a case was proper to be admitted.

'Undoubtedly where such evidence is offered, great responsibility lies upon the judge, and as was said by Bray J. in *R. v. Bond* [1906] 2 K. B. 389, 417, in view of the strong prejudice that would necessarily be created in the minds of the jury by evidence of this class, which shows that the prisoner has been guilty on another occasion of a similar offence, the greatest care ought to be taken to reject such evidence unless it is plainly necessary to prove something which is really in issue' (at p. 157).

The Court held that the evidence objected to satisfied that test; it was necessary to establish the intent with which the prisoner did the act, if he was the person who did it; and of that there was ample evidence.

A. Q. M.

REAL PROPERTY — RESTRICTIVE COVENANTS — NO BUILDING SCHEME —
COVENANT WITH ASSIGNS OF VENDORS UNDER A PRIOR CONVEYANCE
—EFFECT OF LAW OF PROPERTY ACT, 1925, s. 56.

Re Ecclesiastical Commissioners for England's Conveyance.
[1936] Ch. 430.

IN 1837 the Ecclesiastical Commissioners conveyed West Heath House to X in fee simple, X entering into certain restrictive covenants with respect to the house. Mathieson and Lyall succeeded to X's title, and this was an application by them for a declaration under the Law of Property Act, 1925, s. 84 (2) that the premises were no longer subject to these covenants. The respondents were the Commissioners, who did not oppose the application, and Mrs. F. and Mrs. W., neighbouring landowners, who claimed to enforce the covenant. There was no building scheme affecting W. H. House or the surrounding land.

Luxmoore J. pointed out that even if there were no building scheme, restrictive covenants may be enforced if they are expressed in the original deed to be for the benefit of any particular parcel of land. He found that the restrictions imposed by the Commissioners' original conveyance

to X were restrictive covenants, the burden of which ran with the land, and went on to consider whether these restrictions were imposed for the benefit of any hereditaments, and if so what persons were now entitled to enforce them. X had covenanted 'with the Ecclesiastical Commissioners and their successors and also as a separate covenant with their assigns owners for the time being of the lands adjoining or adjacent to W. H. House'. The predecessors in title of Mrs. F. and Mrs. W. were assigns of the Commissioners, whose conveyances were prior in date to that of the covenantor X. Hence, neither the predecessors nor Mrs. F. nor Mrs. W. were parties to the conveyance of 1887. But the Law of Property Act, 1925, s. 56 (1) provides that a person may take the benefit of any covenant respecting land or other property, although he is not named as a party to the conveyance. The learned judge held that under this section the 'assigns' mentioned in the deed of 1887 and their 'successors' in title could take the benefit of the covenant, as it was intended to enure for the benefit of the land. He held further that on the facts Mrs. W.'s land was not 'adjacent', and that she could not enforce the covenant.

This decision is of importance to conveyancers, for it illustrates the latent possibilities as a factor in the development of the law of restrictive covenants of section 56 (1), *supra*, which replaced the Real Property Act, 1845, s. 5. In *Dyson v. Forster* [1909] A. C. 98, 102, Lord Macnaghten doubted the Court of Appeal's contention that for section 5 to apply the covenant must, in order to be enforceable by a person not a party to the deed, be one the benefit of which runs with the land of the person seeking to enforce it. Luxmoore J. (*obiter*) pointed out that since 1925 this alleged requirement is still more open to doubt, as section 56 covers personal as well as real property. The necessity of showing an intent that the restriction should enure for the benefit of the land has ever been the stumbling block in proving that a covenant runs with the land. The possibilities of section 56 cannot therefore be neglected by draftsmen of covenants.

R. N. G.

REAL PROPERTY — RESTRICTIVE COVENANTS — NO BUILDING SCHEME —
BENEFIT OF COVENANTS—SUBSEQUENT PURCHASER OF PART OF LAND
RETAINED.

Drake v. Gray. [1936] Ch. 451.

IN a deed by which lands held on trust for sale were partitioned among the beneficiaries, the trustees covenanted 'with the respective parties . . . and other the owners or owner for the time being of the remaining hereditaments so agreed to be partitioned' not to erect on any plot houses of less than a certain cubical content. D., purchaser of a strip of the partitioned land, sued G., the purchaser of another part, for breach of this covenant. There was no building scheme.

Luxmoore J. decided for the plaintiff, holding that the words of the covenant showed a clear intention to annex the covenant to each and every portion of the covenantee's land.

In the Court of Appeal, Slesser L.J. adopted the test laid down in *Re Union of London & Smith's Bank's Conveyance* [1933] Ch. 611—was

the benefit of the covenant intended to enure to each portion of the land? He remarked on the absence of the words 'or any part thereof' or 'any', employed in that case, but while he affirmed the principle there laid down, he denied that such phrases, apt as they are, are the sole means by which it may be shown that the benefit of the covenant was intended to enure to each portion of the land retained. Here that intention was clearly expressed. Romer L.J. concurred in this interpretation, but seemed influenced by a subjective test, *i.e.* as the covenant was in a partition deed, the parties must have intended, whether they expressed that intention or not, that every small plot should be subjected to restrictive covenants. Greene L.J. held that on a true construction in the special circumstances, the area of land to which the benefit was annexed was the whole of the land, not the land as a whole. Luxmoore J.'s decision was unanimously affirmed.

This case shows the limits of *Re Union of London & Smith's Bank's Conveyance*. The defendant's contention that there was some peculiar magic in the words 'or any part thereof' received summary treatment from the Court of Appeal. Each case must be decided on the construction of the covenant in question. The intention of the parties, as expressed in the document, is the guide. To hold that any precise formula of words was necessary, though it would beget certainty, would cause hardship in cases like the present. It is to be remembered however that the Court construes what the parties actually said, not what they intended to say; the test is an objective one.

R. N. G.

SALE OF GOODS—SALE OF GOODS ACT, 1893—PASSING OF PROPERTY.

Re Anchor Line (Henderson Bros.), Ltd. [1937] 1 Ch. 1.

THE Ocean Co. entered into a contract with the Anchor Line concerning a crane, the property of the former company. The contract provided (1) that the Anchor Line should take over the crane at a deferred purchase price of £4,000; (2) that certain annual sums were to be paid by the purchasers for interest and depreciation, and that the sums paid for depreciation should be deducted from the purchase price when it was ultimately paid; (3) that the purchasers were to have charge of and responsibility for the crane in all respects. The Anchor Line went into voluntary liquidation and the liquidator made a contract to sell the crane to a new company. The agents of the Ocean Co. claimed that, as the property in the crane had not passed to the Anchor Line, it was not included in their assets, and that the liquidator must therefore return the crane or continue the payments. The liquidator contended that the property in the crane had passed to the Anchor Line.

Eve J. held that rule 1 of section 18 of the Sale of Goods Act, 1893, applied, and that the property in the crane had passed. The Court of Appeal reversed this decision.

Their Lordships pointed out that section 18 of the Act lays down no hard-and-fast rules as to when the property in goods is to pass under a contract of sale: it merely contains rules for ascertaining the intention

of the parties, which is the governing factor (section 17): the rules are only applicable in the absence of an expression of contrary intention. This was an unconditional contract for the sale of specific goods in a deliverable state: was there anything in the contract to rebut the presumption that the property passed immediately it was formed? The Court unanimously held that there was evidence of contrary intention sufficient to exclude rule 1 of section 18.

Lord Wright M.R. in examining the contract concluded that 'interest' was used loosely to mean rent or hire: it did not indicate that the Anchor Line became indebted, upon the formation of the contract, to the vendors for the whole of the purchase price. The clause as to responsibility for the crane would have been meaningless had the property in it passed to the Anchor Line at the outset: and the use of the words 'until the completion of the purchase' in the stipulation as to annual payments was also significant. He therefore came to the conclusion that the contract was an agreement to purchase on the terms that the property in the goods was not to pass until the price was paid.

Romer L.J. agreed: he thought that 'interest' could not be given its ordinary meaning, for the sums to be paid as interest were fixed and did not vary as the amount due as purchase-money was paid off: in fact the so-called interest was merely hire. 'Depreciation' was meaningless if the contract passed the property in the crane: and so was the clause as to responsibility: had the property passed the risk would have been on the purchasers.

Greene L.J. held that the contract could not be one for immediate purchase with payment by instalments: the depreciation clause would have been useless in such a contract. The clause as to interest did not necessarily show that the contract was intended to be an immediate sale: the payment of some such sum, whatever it might be called, was inevitable if the property did not pass.

The Court therefore gave judgment on the basis that the property in the crane remained in the Ocean Co. The importance of the case lies in the example which it affords of the circumstances which will be regarded by the Courts as sufficient to rebut the presumption laid down in section 18, rule 1 of the Sale of Goods Act as to the moment at which the property passes in a contract for the sale of goods. It seems that the decisive factors in this particular contract were the clauses providing that annual sums should be paid for depreciation and that the purchasers should be responsible for the crane.

It is perhaps worth while to add that if 'interest' had been used in its strict sense, so as to indicate that the buyers were receiving credit for the purchase price and paying for the privilege, it would have been immaterial whether the time for payment were to be postponed according to section 18, rule 1.

E. C. R.

SETTLEMENT—VOLUNTARY SETTLEMENT OF EXPECTANCY—POWER OF RECEIPT GIVEN TO TRUSTEES—RECEIPT BY TRUSTEES—SETTLOR CLAIMS PROPERTY AS HER ABSOLUTE PROPERTY—PROPERTY IMPRESSED BY TRUSTS OF THE SETTLEMENT.

Re Bowden; Hubbert v. Bowden. [1936] Ch. 71.

B. BY a voluntary settlement in 1868 purported to settle *inter alia* all property she might acquire on the death of her father and gave full powers to the trustees to receive and give receipt for such property and to hold that property upon the trusts laid down in the settlement. On the death of the father in 1869 his executors transferred to the trustees of the settlement the share to which the settlor was entitled under the will. The settlor later claimed the investments and cash representing the funds held by the trustees as her absolute property.

It was argued for B. that the settlement being of something which was hers only in expectancy was void and that the trustees received as agents and were unable to set up the settlement on a claim for the property. The assignment of an expectancy if voluntary and without consideration is inoperative and it was therefore argued on the authority of *Meek v. Kettlewell* (1842) 1 Ha. 464 and *Re Ellenborough* [1903] 1 Ch. 697 that the settlement was void.

Bennett J. held that though B. had only a *spes successionis* in the property she purported to assign and had therefore nothing capable of being assigned at law, or even in equity, without consideration, yet as no objection could be taken in such a case to the appointment of attorneys to receive the property, and as the authority was unrevoked, the trustees received the property on the settlor's authority and must hold it, according to the settlor's directions, subject to the trusts of the settlement. *Re Ellenborough* and *Meek v. Kettlewell* only decided that as equity will not assist a volunteer it would not in such a case assist the trustees to obtain the property. As Bennett J. said (at p. 75): 'But here nobody is seeking the assistance of the Court of Equity to enforce the voluntary settlement. Under a valid authority, unrevoked, the persons appointed trustees under the settlement received the settlor's interest under her father's will, and, immediately after it had been received by them, as a result of her own act and her own declaration, contained in the voluntary settlement, it became impressed with the trusts contained in the settlement.'

An assignment of an expectancy has no effect even in equity unless there is consideration, for it is there treated as a contract: *Re Clarke* (1887) 36 Ch. D. 348; *Tailby v. Official Receiver* (1888) 13 App. Cas. 523. That this is simply a matter of enforceability is shown by Buckley J.'s remark in *Re Ellenborough* (at p. 701) when he refers to Chitty J.'s statement in *Re Tilt* (1896) 74 L. T. 163 that such an assignment was wholly inoperative. He says: 'By "wholly inoperative" there the learned judge of course did not mean that if the voluntary settlor had handed over the funds the trustees would not have held them upon the trusts, but that the grantees under the deed could not enforce it as against the settlor in a Court of Equity or elsewhere.' The unrevoked power of attorney seems to bring the present case within the position contemplated by the learned judge.

However, *Re Bowden* shows that where the property becomes vested in trustees in accordance with a power of attorney they hold subject to the

trusts of the settlement even though the purported assignment is without consideration and equity will enforce those trusts. The exact limits of the decision are however not clear. The effect of bankruptcy upon such an assignment coupled with a power of attorney and cases where the assignee receives the property by some act other than that of the assignor must await further decision.

W. W.

TORT—DANGEROUS PREMISES—INVITEE SLIPS ON MAT COVERING HIGHLY POLISHED LINOLEUM—OCCUPIERS HELD LIABLE BOTH IN TORT AND UNDER IMPLIED TERM IN CONTRACT.

Weigall v. Westminster Hospital. (1936) 52 T. L. R. 301.

In this case the Court of Appeal affirmed the decision of Horridge J. (51 T. L. R. 554) by which damages were awarded to W., the plaintiff, in an action against the defendants for negligence.

W.'s son was a paying patient at the Westminster Hospital's annexe. Having visited her son there W. went into a consulting-room to interview the consulting surgeon. The floor was covered with highly polished linoleum. W. put her foot on a mat, which slipped, causing her to fall and thus sustain injury.

The main point was whether the defendants were liable to W. as occupiers and in order to decide that the question was, 'In what capacity did she enter the hospital?' Slesser L.J. found that W. had been paying a weekly sum for the treatment and accommodation given to her son, and it was clear that it was an implied term of the contract that she should be allowed to visit him and to consult the surgeon at reasonable intervals. And it was a reasonable extension of this condition that she should consult the surgeon in a room other than that in which her son was. Since, then, she was in the consulting-room under an implied contract, she was there, *a fortiori*, as an invitee. Slesser L.J. quoted Lord Hailsham L.C. in *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck* [1929] A. C. 358, 364: 'The duty which rests upon the occupier of premises . . . differs according to the category into which the visitor falls. . . . The highest duty exists towards those . . . who are present by invitation of the occupier. Towards such persons the occupier has the duty of taking reasonable care that the premises are safe.' But, as was pointed out in *Hall v. Brooklands Auto-Racing Club* [1933] 1 K. B. 205, this does not mean that a person who invites another person on his premises is an insurer. As was said in *Maclean v. Segar* [1917] 2 K. B. 325, 332: 'He [the invitor] is not to be held responsible for defects which could not have been discovered by reasonable care and skill on the part of any person concerned with the construction, alteration, repair, or maintenance of the premises.'

In the present case it was conceded that no precautions were taken against the danger. But did, in fact, such a danger exist? And if it did exist was there any duty on the defendants, using reasonable care, to anticipate such danger? It was held that, since the floor had been specially treated and polished for sanitary purposes, it presented circumstances of unusual danger when a mat, on which people were likely to

tread, was placed on it. And the defendants knew, or ought to have known, of this danger. Consequently they were liable for the injury.

Slessor L.J. also suggested that liability might have been based on the implied term in the contract as well as on the wider grounds of an occupier's liability towards an invitee.

This case followed the existing law relating to the duties of an occupier towards an invitee and those towards a mere licensee (*vide Indermaur v. Dames* (1868) L. R. 1 C. P. 274; 2 C. P. 311; *Fairman v. Perpetual Investment Building Society* [1923] A. C. 74; *Francis v. Cockrell* (1870) L. R. 5 Q. B. 184, 501).

What is worth special note is that Scott L.J. deprecated the use by Horridge J. of the phrase 'licensee for payment', for it might imply that there is a fourth class of visitor in addition to the well-recognized (1) invitee, (2) licensee, (3) trespasser; and that was emphatically negated by Lord Hailsham in *Dumbreck's Case* (*supra*). The terminology is already sufficiently confused without any further cross-breeding; as it is, even so great a judge as Scrutton L.J. favoured a difference between an 'invitee for payment' and an invitee who does not pay: *Hayward v. Drury Lane Theatre, Ltd.* [1917] 2 K. B. 899, 914; *Sutcliffe v. Clients' Investment Co., Ltd.* [1924] 2 K. B. 746, 757. Yet this distinction also seems to be unnecessary and embarrassing.

D. E. G.

TORT—NEGLIGENCE—DANGEROUS PREMISES—SALE OF A HOUSE—BUILDER'S DUTY AS VENDOR—DEFECTIVE CEILING—WARRANTY TO PURCHASER—NO DUTY TO OCCUPANT IN SALE OR LEASE OF AN UNFURNISHED HOUSE—OPPORTUNITY FOR INSPECTION.

Otto v. Bolton and Norris. [1936] 2 K. B. 46.

THE defendants sold a house to Miss Otto. She bought it relying on their assurance that it was well built, nor would she have bought it but for that assurance. In fact the ceilings were negligently constructed and, in a bedroom, one collapsed, injuring Mrs. Otto (the mother of Miss Otto, the purchaser).

Miss Otto sued the defendants in contract and Atkinson J. held that the assurance that the house was well built was a collateral undertaking forming part of the contract and that it was a warranty. He therefore had no difficulty in finding the defendants liable for breach of it.

Mrs. Otto sued in tort for negligence. She argued that *Donoghue v. Stevenson* [1932] A. C. 562, where it was held that the manufacturer of an article for human consumption or use owes a duty to the consumer, who has no opportunity for inspection, to see that it is free from defect, had overridden the old rule that—contract apart—the vendor or lessor of an unfurnished house owes no duty to the purchaser, lessee, or any person using the premises to see that they are in good condition. This rule was followed in *Bottomley v. Bannister* [1932] 1 K. B. 458.

Atkinson J. found that this rule had not been thus abrogated. Accordingly he held that the defendants were under no liability to Mrs. Otto. It is respectfully suggested that the learned judge rightly so found.

Lord Atkin in his speech in *Donoghue's Case* (at p. 597) acknowledged 'the well-known absence of any duty in respect of the letting of an unfurnished house'. This absence of duty which in *Cavalier v. Pope* [1906] A. C. 428 had prevented the plaintiff (the wife of a tenant who had a contract with the landlord) from recovering in tort for negligence has not been affected by the general principle of *Donoghue's Case*.

Moreover in *Otto's Case*, as the learned judge emphasized, there was that opportunity for inspection which may take even a chattel outside the rule in *Donoghue's Case*, as in *Farr v. Butters* [1932] 2 K. B. 606 and *Evans v. Triplex Glass Co.* [1936] 1 All E. R. 283.

Even the wider principle on which Lord Atkin based his own opinion in *Donoghue's Case* is excluded in cases of realty by his own *dictum* quoted above. That wider principle is that I must not injure my neighbours, 'persons who are so closely and directly affected by my act that I ought to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question': [1932] A. C. at p. 580. The application of this principle is impossible while the House of Lords remains bound by its own decision in *Cavalier v. Pope*.

It is noteworthy that Atkinson J. considered the 'reasonable opportunity of inspection' test to be an exception to liability not only to the narrower aspect of *Donoghue's Case* but also to Lord Atkin's wider principle laid down in it. Perhaps the same result would have been attained by applying the principle of contributory negligence or (less felicitously) the maxim *volenti non fit iniuria*.

There seems little to excuse this denial to the purchaser or lessor of a tumble-down house of the remedy available against the manufacture of tainted food. If the Courts in cases like that of *Otto v. Bolton* are to be enabled to avoid the decision which Atkinson J. 'greatly regretted' the aid of the Legislature ought to be sought. The Housing Act, 1925, s. 1, has modified the rule in case of houses, in London of a rental of £40, or in the provinces of £26. But this applies only as between landlord and tenant; it does not affect the liability of the landlord to third parties.

W. P. G.

TORT — NEGLIGENCE — HOSPITAL — ADMINISTRATION OF HOSPITAL — NEGLIGENCE OF MEDICAL STAFF IN ADMITTING PATIENT TO INFECTED HOSPITAL — HOSPITAL AUTHORITIES HELD LIABLE.

Lindsey County Council v. Marshall. [1937] A. C. 97.

(Decision of C. A. [1935] 1 K. B. 516, was noted in C. L. J. vol. VI, 119.)

SHORTLY before Mrs. M. was admitted to the Council's maternity home there was a case of puerperal fever. The usual stringent methods of preventing infection were not adopted. The day before Mrs. M. was admitted there was a second case. The matron admitted Mrs. M. without informing her, or her husband, or her medical adviser of the infectious cases. Five days later Mrs. M. contracted puerperal fever. The Council were held liable for the matron's breach of duty and the verdict survived the Court of Appeal. The Council asked the House of Lords to set aside

the verdict on the ground that withholding the information was a matter not of ordinary administration but of professional skill, and they could not be liable.

In dismissing the appeal their Lordships were of the opinion that disinfection precautions and the admission of patients were matters of administration. Lord Wright M.R. compared the liability of the Council to that of the owner of a house, in which there is an infectious case, to take care that persons entering were not negligently exposed to danger or were at least warned of the risk. In this, as in other matters, the Council could take the advice of experts, such as qualified doctors and nurses, but such a precaution would not enable them to escape liability. Their Lordships approved the statement of the law contained in the judgment of Kennedy L.J. in *Hillyer v. St. Bartholomew's Hospital* [1909] 2 K. B. 820, 829, but considered it inapplicable to the facts of the present case. As an authoritative decision on a type of case which is now frequently before the Courts, its importance to hospitals, patients, and the medical profession cannot be exaggerated. There is a useful note in the issue of *Law Notes* for October 1936 at p. 311.

G. T. H.

TORT—NEGLIGENCE—HOSPITAL—NURSES—SERVANTS OR INDEPENDENT CONTRACTORS—DUTY OF HOSPITAL AUTHORITY IS, SO FAR AS THE PROFESSIONAL (AS DISTINCT FROM THE MINISTERIAL) SKILL OF NURSES IS CONCERNED, MERELY TO USE CARE IN THEIR SELECTION.

Strangways-Lesmere v. Clayton. [1936] 2 K. B. 11.

THE plaintiff's wife was admitted to a hospital to undergo an operation. Before the operation, the house surgeon wrote out the 'bed-card' instructions as to the preparation of the patient, and on it he stated that six drachms of a drug were to be administered at a specified time. Two nurses misread these instructions and administered six ounces instead of six drachms, with the result that the patient died.

The dose was not checked by the sister in charge or her deputy, though this was the practice in the hospital. No notice to the nurses as to the necessity for such checking was exhibited in the hospital.

The plaintiff brought an action for damages under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934, against (i) the nurses, and (ii) the hospital authority.

Horridge J. held (i) that the nurses had been negligent and were personally liable; (ii) that the hospital authority was not liable as principal for the nurses' negligence.

The learned judge based his decision on the following points: (1) the hospital authority had fulfilled its duty of employing duly qualified nurses; (2) a hospital authority is not liable for the negligence of a duly qualified nurse when performing a duty entailing professional skill; but probably the authority is liable for the negligence of a nurse when performing purely ministerial or administrative duties; (3) the administration of the dose in question was not a mere ministerial act, but one in which the nurse was to use her professional skill; (4) the failure to

exhibit the notice as to checking the amount of drugs was not an act of negligence on the part of the hospital authority.

The learned judge cited with approval the test laid down by Kennedy L.J. in *Hillyer v. Governors of St. Bartholomew's Hospital* [1909] 2 K. B. 820 at p. 829: 'It may well be, and for my part I should, as at present advised, be prepared to hold, that the hospital authority is legally responsible to the patients for the due performance of their servants within the hospital of their purely ministerial or administrative duties, such as, for example, attendances of nurses in the wards, the summoning of medical aid in cases of emergency, the supply of proper food and the like.' Horridge J. then said (pp. 16—17): 'I do not think this is a matter of a nurse's routine, but one in which she is to use professional skill, and the only duty on the hospital is to see that the nurses they engage are duly qualified persons.'

Though this case deals only with the case of nurses, perhaps its principle is applicable to doctors employed by a hospital. In *Lindsey C. C. v. Marshall* [1937] A. C. 97 Viscount Sankey said (p. 114): 'There may be some cases where a doctor, a matron or a nurse is clearly doing an act in his or her professional capacity. There may be other cases where a matron or nurse, and as I think even a doctor, may be doing an act not in his or her professional capacity.'

The difficulty which presents itself is that of determining what are 'administrative or ministerial' duties on the one hand, and 'professional' duties on the other. The answer will depend essentially on the particular facts before the Court and no good purpose would be served in laying down beforehand on which side of the line certain duties fall. See Lord Wright in *Marshall's Case* (above) at p. 124 (cf. 181 *Law Times Journal* 247).

Probably the most interesting point in this case is the finding of the learned judge that the administration of the drug was a 'professional' duty, for it must be remembered that the act of negligence lay rather in the measuring of the dose than in its administration.

T. C. T.

TORT—NEGLIGENCE—MASTER AND SERVANT—COURSE OF EMPLOYMENT—
NEGLIGENCE OF SERVANT OF BAILEE—BAILEE HELD LIABLE TO BAILOR.

Aitchison v. Page Motors, Ltd. (1936) 52 T. L. R. 137; 154 L. T. 128.

THE defendants, who were motor dealers at Epsom, received A.'s car for repair, thereby becoming bailees for reward. With A.'s consent they sent the car to the manufacturers. Q., the defendants' service manager, went to fetch the car, and received delivery at 7 p.m. He then used the car for his own purposes and negligently involved it in an accident in which he and his passengers were killed. A. sued the defendants for the damage to her car, and they were held liable on the ground that Q. was acting in the course of his employment when the accident occurred.

A. relied largely on *Coupé Co. v. Maddick* [1891] 2 Q. B. 413, where M. had hired a carriage and horse from the plaintiffs. M.'s servant, instead of driving the carriage back to the stable as he was ordered, went

off on business of his own, and M. was held liable for damage caused by the servant's negligence. The ground of the decision was not so much vicarious responsibility in tort as liability upon the bailment of hire which in effect set up a contractual duty; the bailee was liable for breach of this duty whether it were due to his personal negligence or to that of his servant. But in *Sanderson v. Collins* [1904] 1 K. B. 628, which was another case of a hired carriage, which for business of his own the defendant's servant took out and damaged through his negligence, the defendant was held not liable as the servant was not acting in the course of his employment, and the Court of Appeal held that the true ground upon which *Coupé Co. v. Maddick* was decided was vicarious responsibility, not bailment. In a Scots case, *Central Motors (Glasgow), Ltd. v. Cessnock Garage and Motor Co.* [1925] S. C. 796, where B's night watchman, who was responsible for the safe custody of A's car which had been bailed to B, took it out, contrary to orders, and by his negligence damaged it, B was held liable.

The key to the liability of the bailee to the bailor in cases of this type seems to lie in the words of Willes J. in *Barwick v. English Joint Stock Bank* (1867) L. R. 2 Ex. 259 at p. 266, where he says that the master 'has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in' (adopted by Macnaghten J. in the case before us). Once the bailee has set his servant to perform an act, he becomes as liable to the bailor as if his servant's acts were his own. Surely this is the distinction between *Coupé Co. v. Maddick*, where the servant started to fulfil his master's orders and then went off on his own purposes, and *Sanderson v. Collins*, where the servant was never under orders to take out the carriage.

F. C. P.

Another contributor adds the following note:

As the learned editor of *Salmond's Law of Torts* points out, the ordinary rules of vicarious liability are somewhat extended in a case where a bailor is suing a bailee for damage done to the chattel bailed by the wrongful act of the latter's servant (see 9th ed. pp. 103-4).

A bailee was liable *ex delicto* for abuse of the bailment before English law knew any developed theory of contract. It was not until the sixteenth century that the contractual aspect of bailment became prominent (see Winfield, *Province of Law of Tort*, ch. V, and Pollock on Contract, p. 174). To-day, though it is probable that the bailee's liability is *ex contractu* (*Coupé Co. v. Maddick* [1891] 2 Q. B. 413), it has been held that there can be a bailment without a contract (*R. v. McDonald* (1885) 15 Q. B. D. 323).

When a wrongful act of a bailee's servant causes injury to the chattel bailed and to the person or property of a third party, the effect of this historical development is most apparent, and the curious result is that a servant may at the same time be acting within and outside the course of his employment. It is a defence to the action of the third party to show that the servant was at the time engaged on a frolic of his own. Against the bailor such a defence may not succeed. If the bailee has not deputed his duty of custody to the servant then in the absence of a breach of duty on his own part the master will not be liable for his servant's tort (*Sanderson v. Collins* [1904] 1 K. B. 628). If the servant has been

entrusted with the custody of the chattel then the bailee will be liable for any injury caused by his servant, even while he is engaged on a frolic of his own, unless the injury amounts to a crime (*Cheshire v. Bailey* [1905] 1 K. B. 237), the criminal intention being held to sever the relationship. Unless the master can show that the injury to the chattel was not the consequence of his servant's breach of duty, but the actual cause of it, he will be liable to the bailor. See *Central Motor, Ltd. v. Cessnock Garage* [1925] S. C. 796 at p. 805, *per* Lord Sands, and 52 L. Q. R. pp. 310-11.

G. T. H.

TORT—NUISANCE—MALICE—USER OF LAND—DEFENDANT HELD LIABLE FOR ACTS MALICIOUSLY COMMITTED WITH INTENT TO INJURE PLAINTIFF IN HIS USER OF LAND.

Hollywood Silver Fox Farm, Ltd. v. Emmett. [1936] 2 K. B. 468.

THE plaintiffs used their farm for the purpose of breeding silver foxes. E., whose land adjoined the farm, maliciously caused his son to discharge guns on his own land as near as possible to the breeding pens, with the intention of injuring the plaintiff by interfering with the breeding of the foxes. E. knew that the animals are very nervous in breeding time and liable, if disturbed, to miscarry or to kill their young, and this in fact happened.

Macnaghten J. held that the plaintiffs were entitled to an injunction and to damages. For the plaintiffs *Christie v. Davey* [1893] 1 Ch. 316 was cited. There it was held that a degree of noise not otherwise actionable may become an actionable nuisance if it is caused maliciously, and counsel urged that this was so in spite of *Bradford Corporation v. Pickles* [1895] A. C. 587.

For the defence it was submitted that shooting on one's own land was not actionable even if done maliciously; for in the above case the Corporation of Bradford had sought to restrain Pickles from sinking a shaft into his land with the sole object of injuring the Corporation. The House of Lords decided once and for all that if an act be not otherwise unlawful, evil motive on the defendant's part will not make it unlawful. The case of *Allen v. Flood* [1898] A. C. 1, 124, was also decided on the same grounds by the House of Lords. The defence also cited *Robinson v. Kilvert* (1889) 41 Ch. D. 88, where it was held that no actionable wrong had been committed by the defendant, who in heating the basement of which he was tenant, caused injury to brown paper which the plaintiff kept on the ground floor. The heating was not of such a character as would interfere with the ordinary user of the rest of the house. So, here, it was contended that the keeping of a silver fox farm was not an ordinary user of land and that shooting would have caused no harm to animals usually found on farms in Kent.

Macnaghten J. found himself confronted with the question which had been debated in *Allen v. Flood*, whether the decision in *Keeble v. Hickeringill* (1706) 11 Mod. 74, 130 was well founded. The conflicting comments upon it by various members of the House of Lords left the answer to it open, but Macnaghten J. regarded it as still good law. In

that case the plaintiff, the owner of a duck decoy, sued the defendant for shooting at and disturbing the ducks in his decoy. The jury found a verdict for the plaintiff. There were, however, other cases which were authority for the view that in an action for nuisance by noise the intention of the person making the noise must be considered: *Gaunt v. Fynney* (1872) L. R. 8 Ch. 8, 12 (*per* Lord Selborne); *Christie v. Davey* [1893] 1 Ch. 316, where an injunction was granted by North J. against the defendant restraining him from causing or permitting any sounds or noises in his house so as to vex or annoy the plaintiffs or the occupiers of the house; North J. was satisfied that the noise was made maliciously for the purpose of annoying the plaintiffs. In *Ibbotson v. Peat* (1865) 3 H. & C. 644 the defendant argued that he was justified in letting off rockets and bombs because he was attempting to prevent the plaintiff from reaping any benefit from luring grouse from the land of the defendant's employer to his (the plaintiff's) land. The Court held the defendant liable.

These cases were decided before the decision of the House of Lords in *Bradford Corporation v. Pickles* (*supra*) but his Lordship was of the opinion that they were not overruled by it. The decision in this case, which is obviously a reasonable one, seems to be a correct interpretation of the authorities considered in it.

J. L. F.

TORT — NUISANCE — TRESPASS — CASE — INJURY TO SERVITUDE — SEVERAL FISHERY — POLLUTION OF RIVER — INVASION OF LEGAL RIGHT — PROOF OF PECUNIARY LOSS NOT NECESSARY.

Nicholls v. Ely Beet Sugar Factory, Ltd. [1936] Ch. 343.

THE defendants were owners of a beet sugar factory adjoining the River Ouse some five miles above the beginning of a several fishery in gross owned by the plaintiff. The plaintiff claimed damages for interference with, and disturbance of, his fishery during the years 1933 and 1934, and alleged that his fishery had been prejudicially affected by the discharge of refuse and effluent into the river from the defendants' factory.

In dismissing the action, Clauson J. held: (i) that damage was the gist of the action in cases of this character, and that the plaintiff had failed to establish that he had suffered any pecuniary loss; and (ii) that the plaintiff had failed to prove that the injury to the fishery was caused by the effluent from the defendants' factory.

The Court of Appeal upheld the decision on the second ground and the appeal was dismissed; but they held that Clauson J. was wrong in holding that damage is the gist of the action in a claim of this character.

The following points were made in the judgment of Lord Wright M.R. The plaintiff's rights were (a) an incorporeal hereditament in the fishery, and (b) property in the fish found there. An action in trespass may be maintained for breaking and entering a man's close and taking the fish (*Child v. Greenhill* (1638) 4 Cro. Car. 553); and although strictly there cannot be a trespass to the incorporeal hereditament, yet there may be an action 'in the nature of a trespass'. 'Once grant that the owner of such a right can sue in trespass for one kind of infringement of it,

I cannot see why he might not maintain an action on the case for nuisance': *per* Lindley L.J. in *Fitzgerald v. Firbank* [1897] 2 Ch. at p. 102.

In citing this last case, the M.R. deemed it immaterial to decide whether the proper description for that cause of action is trespass, trespass on the case, or nuisance; but both *Child v. Greenhill* and *Fitzgerald v. Firbank* (*supra*) are covered by a passage in Sir Frederick Pollock's *Law of Torts* (13th ed. p. 391), which the M.R. incorporated in his judgment: 'disturbance of easements and the like, . . . is a wrong in the nature of trespass, and remediable by action without any allegation or proof of specific damage'.

Harrop v. Hirst (1868) L. R. 4 Ex. 43 is authority for the proposition that there is a right of action without proof of damage where a legal right is infringed, for otherwise an uninterrupted interference of the plaintiff's rights might be evidence that the plaintiff had abandoned them. But such an action chiefly depends upon the much wider principle of the law which presumes damage when there is an interference with a legal right; 'a damage is not merely pecuniary, but an injury imports damage, when a man is thereby hindered of his right', *per* Holt C.J. in *Ashby v. White* (1703) 1 Sm. L. C. (13th ed.) 253.

Before dismissing the appeal, Lord Wright addressed the Court in no light terms upon the unnecessarily excessive duration of the proceedings, which involved a matter of such comparatively little pecuniary damage to the plaintiff.

The importance of this case lies in its reassertion of the principle propounded in *Ashby v. White* that when a right existing in a party has been infringed, if an injury can be proved, the law will presume that some damage resulted from it.

R. E. O.

TORT—TRESPASS TO LAND—ENTRY BY POLICE ON PRIVATE PREMISES IN EXECUTION OF DUTY, BUT WITHOUT SEARCH WARRANT—HELD, NO RIGHT TO REMAIN AFTER REQUEST TO LEAVE.

Davis v. Lisle. [1936] 2 K. B. 434.

L., a POLICE officer, saw in a garage a motor lorry which he believed had been causing an obstruction some time previously. In company with another police officer he entered to make inquiries as to the person responsible for the obstruction. D., who was proprietor of the garage, came in and in strong terms demanded that the police officers should leave the garage. The latter had not asked nor obtained permission to enter the premises, neither had they a search warrant; but the respondent proceeded to take out his warrant card, whereupon D. assaulted him.

Charges were brought against D., *inter alia*, for assaulting and obstructing a police officer in the execution of his duty. He was convicted; the conviction was upheld at Quarter Sessions. He appealed then to the Divisional Court, which quashed the conviction.

On behalf of D. it was contended that when he struck L. the latter was no longer acting in execution of his duty, but was in fact a trespasser

on D.'s premises; that even if his entry had been lawful, L. had no right to remain after he had been requested to leave; and that the fact that he produced his warrant card must be taken as evidence that he intended to remain. Counsel for L. conceded that if this inference was correct, then L. was no longer acting in execution of his duty.

Lord Hewart C.J. said that the material point at issue was whether the police officers were acting in execution of their duty at the time; he was not going to deal with the question whether D.'s conduct was justified by his view that the officers were trespassers. The police officers were undoubtedly trespassers from the moment when they had been requested to leave. The production of the warrant card clearly amounted to a claim to remain there as of right. His Lordship cited a passage from the judgment of Atkin L.J. in *Great Central Ry. v. Bates* [1921] 3 K. B. 578, 582: '... It appears to be very important that it should be established that nobody has a right to enter premises except strictly in accordance with authority.'

Goddard J. agreed, but added that he thought there was an invitation to the officers to enter the garage, since they had lawful business with the proprietor. But once they were asked to leave they became trespassers, and whether the officer produced his warrant or not made no difference.

du Parcq J. cleared up a puzzling passage in the judgment of Lord Sterndale M.R. in *Great Central Ry. v. Bates* (*supra*) by pointing out that it did not really decide that the constable there was acting in the execution of his duty.

R. M. S.

BOOK REVIEWS.

Outlines of Criminal Law. By COURTNEY STANHOPE KENNY, LL.D., F.B.A. Fifteenth edition revised by G. GODFREY PHILLIPS, M.A., LL.M., of Gray's Inn, Barrister-at-Law. Cambridge University Press. 1936. xlv, 625 and xvi pp. (15s. net.)

FOR many years we regarded *Kenny's Outlines* as approaching more nearly to the ideal students' text-book than any other work. But Professor Kenny last edited the book himself in 1929, and when Mr. Phillips brought out his edition in 1933 comparatively few changes were made, in part no doubt owing to the *reverentia* of the editor, in part owing to the *parsimonia* of the publishers. As the years slipped by the book became less abreast of the times and so fell further from the ideal. Mr. Phillips by the work he has done in the fifteenth edition has replaced it on its pedestal.

Far the most important and the most difficult task which confronted the editor was the proper treatment of the subject of *Mens Rea* in the light of Mr. J. C. W. Turner's important work in that field. That task Mr. Phillips has tackled with courage and his masterly re-statement is a triumphant success. He has also shown skill in incorporating the results of recent research on the topics of Attempts, Larceny by a Trick and Evidence of Similar Facts. (But is not 'Acts' better than 'Facts'?) We are glad too that at last the dates of all cases appear in the footnotes. The publishers deserve their share of praise for the great improvement in the fifteenth as distinguished from the fourteenth edition. The type is larger and much more easy to read.

Any criticisms must perforce be of the hypercritical variety. We think that a uniform system should be preserved as to the references to cases quoted in the text—they are often given in the body of the text, sometimes the date only is given in the text, and sometimes both date and reference are in the note only. Nor do we think it convenient that sometimes (*e.g.* p. 163) statutes should be referred to by their regnal years only, without the short title. These are indeed small matters.

In producing a text-book on the common law it is always difficult to know how to treat America. In our opinion there is both too much and too little of America in this book. There are perhaps too many citations from American cases—a legacy from Professor Kenny. For example, would it not be better to cite *Mathieson* (1906) 25 N. Z. L. R. 879 rather than *The State v. Bell* for the proposition on p. 71, where there should be some reference to *Chapman* (1910) 4 Cr. App. R. 54. On the other hand, whilst Mr. Phillips has made valuable use of American law journals he does not seem to have made much use of American books. We should have liked to have seen some reference to Thayer's classic *Preliminary*

Treatise on Evidence at Common Law, to Weihofer's *Insanity as a Defense in Criminal Law* and to Jerome Hall's *Theft, Law and Society*.

Mr. Phillips has cast his net wide over English literature, but we were surprised to find no reference to Ewings' excellent book on *The Morality of Punishment* in chapter 33—a chapter which needs modernizing, and possibly Quirke's *Forged, Anonymous and Suspect Documents* might have provided some interesting additions on p. 451, whilst Professor Auld has published in the *Ontario Journal of Neuro-Psychiatry* a valuable article on 'the Criminal Responsibility of Lunatics' and there are some fruitful ideas in *Mentality and the Criminal Law* by Davis and Wilshire. But this is all by way of suggestion rather than criticism.

There are a few points of detail to which attention might be called. Why quote in note 2 on p. 42 an unreported remark of Lord Hewart's when Stephen J. had said just the same thing in the famous case of *Tolson* which appears in K. S. C. itself at pp. 19—20? Is *Sleep*, cited at p. 51, a very safe authority in 1937? The statement on p. 56 that a boy under fourteen cannot be convicted of sexual offences is too wide. Is it really true as said on p. 64 that 'the defence of insane impulse is now rarer than that of Unconscious Automatism'? Is *Beard* really an authoritative declaration of the law as to intoxication (p. 69)? See Stroud in 36 L. Q. R. 268. We are very sorry to see no reference at p. 75 to Mr. Winn's extremely interesting article which appeared in this journal (vol. 3, p. 405) on the Criminal Liability of Corporations. Possibly the treatment of the law of marital coercion before 1925 might be shortened. Is an unreported summing-up of Pollock L.C.B. the best authority that can be given for the presumption of innocence on p. 387? Is that summing-up even accurate in the light of Birkenhead L.C.'s judgment in *Rutherford v. Richardson* [1923] A. C. 1? Perhaps the most valuable illustrations of the maxim *omnia praesumuntur rite ac solemniter esse acta* in criminal law are *Knowles v. R.* [1930] A. C. 366 and *Re Crippen* [1911] P. 108, but neither is referred to on pp. 389-90. On p. 402, note 4, 'convict' should be 'commit for trial'. On p. 427 fourth line from the end should not 'Yet' be 'And'? On p. 445 there might be a reference to *Simon v. Simon* [1936] P. 17, and on p. 450 to *Ankin v. L. & N. E. Ry.* [1930] 1 K. B. 527 and to *Spigelman v. Hocker* (1933) 150 L. T. 256, whilst in note 5 on p. 475 we should like some reference to the problems raised in *Pollinger* (1930) 22 Cr. App. R. 75. Finally we have found the case of the *Poplar Borough Council* [1922] 1 K. B. 95 useful on several points, and think that the statement of the Privy Council (*per* Lord Atkin) in *Proprietary Articles Trade Association v. Att.-Gen. for Canada* [1931] A. C. at p. 324 is the best rendering of the general view as to the nature of a crime. But we find reference to neither.

The niggling nature of these criticisms or suggestions shows how difficult it has been to find anything with which to pick a quarrel with the editor of the fifteenth edition of *Kenny*, and we tender him our heartiest congratulations on the excellent way in which he has carried out the task entrusted to him—a task which badly needed doing. We shall look forward in the next edition to hearing his views on *Sheridan* (1936) 26 Cr. App. R. 1, which was reported too late for inclusion in this edition.

W. T. S. S.

Medieval Representation and Consent: A Study of early Parliaments in England and Ireland, with special reference to the Modus Tenendi Parliamentum. By M. V. CLARKE, M.A., F.S.A., Fellow of Somerville College, Oxford. London, New York and Toronto: Longmans, Green & Co. 1936. viii and 408 pp. (18s. net.)

BEGUN several years before the death of the author in 1935, this book was originally planned as a short study of the difficult problem as to the origin of the document known as the *Modus Tenendi Parliamentum*; but, as her studies progressed, Miss Clarke so enlarged the scope of the work that now, in its published form, it embraces an analytical and descriptive treatment of fourteenth-century parliamentary institutions, the doctrine of consent and the principle of representation. Miss Clarke also considers the question of clerical taxation, and deals with ecclesiastical institutions in England. The existence of the Irish *Modus* led her to study its history and the manuscripts in which it has been preserved as well as to attempt a solution of the problem as to the relation between the Irish document and the English *Modus*. These latter studies caused her to give an account of Irish parliamentary institutions.

The central theme of the book is the *Modus Tenendi Parliamentum*, the authorship of which is assigned to a clerk who was not a lawyer. It is Miss Clarke's conclusion that the *Modus* was written in England in 1322, and not in Ireland at a much later date, and that this English *Modus* was introduced into Ireland about 1370, where in 1419 it became, in effect, the Magna Carta of Ireland (p. 78). Although this view, that the *Modus* originated in England in 1322, based though it is upon an elaborate and scholarly examination of many historical materials, has not been accepted as final by some of our foremost constitutional historians (see, e.g., Miss Cam's review in the *English Historical Review*, October 1936, pp. 701-704, and Mr. Lapsley's review in *The Cambridge Review*, February 5, 1937, pp. 237-238), there can be no question as to the great value of Miss Clarke's researches.

Perhaps the most valuable and suggestive feature of this brilliant study in early parliamentary history is the tracing to ecclesiastical sources of the theory and practice of consent by representatives to taxation, a doctrine which was laid down in the Lateran Council of 1215 and put into practice for the first time in England in the church councils of 1225-6; and to all seeming this influence of the church on the parliamentary system was discovered by Miss Clarke without reference to the similar conclusion which had been reached by O. Hintze, whose articles in the *Historische Zeitschrift* (1929, 1930) she appears not to have seen.

The views of Stubbs and of Maitland as to the origins of the English parliament differed widely. Although Maitland's introduction to the parliament roll of 1305, in which he maintained that in the time of Edward I the highest Court of the realm was the King in his council in his parliaments, has led to a re-examination of the problem as to the nature of the early parliaments from this view-point, there has been in recent years, as Miss Cam has reminded us (*loc. cit.* p. 701), signs of a revival of the older ideas of Stubbs and his school of historians, notably the theory that the early parliament was an assembly of the three estates of the realm. The fact that Miss Clarke's book illustrates this general tendency gives to her studies a special interest.

Quite apart, however, from Miss Clarke's conclusions and tendencies, some of which have already met with opposition, there can be no doubt as to the great learning embodied in her book; and, moreover, it is certain that her study of medieval representation and consent will have a stimulating effect on researches into the origins and nature of parliament in the Middle Ages. Not only in this book, but in a series of brilliant articles, Miss Clarke was engaged at the time of her death in constructing a reinterpretation of English political and constitutional development in the fourteenth century. It is most regrettable that she did not live to complete her work, of which the present study is but an instalment.

H. D. H.

English Constitutional Ideas in the Fifteenth Century. By S. B. CHRIMES, M.A., Ph.D., Lecturer in Constitutional History in the University of Glasgow. Cambridge University Press. 1936. xx and 415 pp. (21s. net.)

DR. CHRIMES has presented to scholars a work of the highest importance in the field of study devoted to the constitutional, legal and political ideas of the fifteenth century in England. His purpose and method are admirably expressed in the well-known words of Maitland: 'What men have done and said, and above all what they have thought—that is history.' Placing himself at the point of vision of a fifteenth-century observer, Dr. Chrimes endeavours, on the basis of a minute and learned examination of contemporary materials, to discover 'the half-expressed concepts and ideas behind the machinery of government' (p. xvi), or, in other words, to examine the constitution as it actually was and to interpret its spirit—the 'opinions, ideas, and assumptions as to the nature and distribution of governmental rights' (p. xx).

Dr. Chrimes has not, therefore, aimed at 'reading history backwards' in order to discover its legacy to ourselves; and, in consequence, he has not sought in the constitution of the fifteenth century the origins of the present-day 'constitutional government' of England. By refusing to follow in the footsteps of historians who seek in the Middle Ages what seems important to ourselves and by boldly taking his stand with Tout, who held that 'we investigate the past, not to deduce practical lessons, but to find out what really happened' (*Administrative History of England*, vol. I, p. 7), Dr. Chrimes, in the desire to confirm and supplement suggestions made by Professor Plucknett ('The Lancastrian Constitution', *Tudor Studies*, 1924), has pursued studies which disclose to us in a clear light the realities of the fifteenth-century constitution and the ideas that lay back of them. He has rendered a noteworthy service to all students of a period as yet imperfectly grasped. His work will be, one may venture to think, the starting-point of all future investigators, within the field which it covers, for a long time to come.

The first of the four chapters is entitled 'The Estate of King' (pp. 1—65). Mr. Pickthorn, in *Early Tudor Government* (vol. I, p. 15), had suggested that the 'rights and powers of the monarchy inherited by Henry VII were unlimited and indefinite'. Dr. Chrimes holds that this is an exaggeration, for 'actually, the king's rights were and always had

been in some sense limited, and in part they were certainly defined' (p. 2, note 1). Dr. Chrimes tells us that 'the phrase commonly used during the late fourteenth and the fifteenth centuries to designate the mass of traditions, attributes, rights, powers—and perhaps duties also—which were deemed to centre in the monarch was "estate of king"' (p. 3). Holding this phrase in mind, he aims, therefore, 'at making some estimate of the extent to which the definition of kingship was carried during the fifteenth century'; and thus he makes a contribution to the long history of the English monarchy as an institution. Within the framework of the two sections of the chapter, namely, 'the conception of the kingship' and 'the Crown in the constitution', the author deals with a variety of topics, such as the attributes of royal estate, the kingdom as property, the kingship as office: its duties, royal estate and royal person, prerogative and prerogatives, and the king's discretionary power. Upon the subject of the right of succession Dr. Chrimes writes in an instructive manner with respect to several claims, more especially those of Henry Bolingbroke (1399), Richard, Duke of York (1460), Edward of York (1461) and Henry Tudor (1485). The chapter as a whole forms a valuable addition to our knowledge of kingship in the fifteenth century.

In the long chapter entitled 'The Nature of Parliament' (pp. 66—191) Dr. Chrimes discusses 'not so much parliament itself, as parliament's image in men's minds', or, in other words, 'how parliament was in fact being *thought of*, as an institution, by the men of the [fifteenth] century' (p. 66); and, in carrying out this design, he considers parliament as the High Court and as the assembly of the three estates of the realm. While the chapter possesses exceptional value as an original study of the estate theory of the nature of parliament, it also increases our knowledge of the two houses of parliament; and in this part of the chapter the representative character of the House of Commons and the place of the lords in parliament are fully considered. As Mr. Lapsley has reminded us, when Maitland wrote his now famous introduction to *Memoranda de parlamento*, the orthodox doctrine of Hallam, Gneist and Stubbs, that Edward I had created a parliament of three estates, still held the field in studies of parliamentary history. Maitland, in that introduction, following Fleta, maintained that in Edward I's time 'the highest tribunal of the realm is the king in council; it is the king in his council in his parliaments, in the presence of prelates, barons, and other learned men'; and that, indeed, 'a session of the king's council is the core and essence of every *parliamentum*' (see Maitland, *Selected Essays*, Cambridge, 1936, pp. 64, 70). It was some time, Mr. Lapsley remarks, 'before scholars grasped completely the bearing and implications of Maitland's essay or realized how strong a solvent of orthodoxy it was destined to be'; and he has clearly indicated 'the more important points at which Maitland's work has been developed or modified by subsequent investigation' (see Mr. Lapsley's note and bibliography prefixed to his edition of Maitland's essay in *Selected Essays*, mentioned above). The chapter by Dr. Chrimes on the nature of parliament is the latest, and one of the most important, of all studies of this subject since the time of Maitland. Especial attention may be drawn to the value of his contribution to the discussion of the problem as to how far, and in what sense, the parliament can be regarded as an assembly of estates.

To the legal historian the illuminating chapter on 'Statutory Law and Judicial Discretion' (pp. 193—299) makes a special appeal (see also

pp. 45—49): it is a chapter enriched by a study both of the jurisprudence of Fortescue and St. Germain and of the law of nature or reason in the Courts. Indeed, to the student investigating the history of the common law Courts and their jurisdiction, not only this chapter, but also other portions of the work, contain fresh matter of absorbing interest.

The historian of political theory will find in the chapter on 'The Theory of the State' (pp. 300—341) a treatment of English political thought in the fifteenth century in which the theories of Fortescue play a predominant rôle. Dr. Chrimes is our present-day authority on Fortescue; and the interest attaching to this chapter will cause the reader to look forward with impatience to the appearance of a new edition of Fortescue's *De Laudibus Legum Angliæ*, written whilst he was in exile in St. Mighelen-Barrois, now being prepared by the same competent hand.

In a brief 'Conclusion' (pp. 342—349) Dr. Chrimes writes of the 'spirit' of the fifteenth-century constitution; while in an Appendix (pp. 350—394) he presents extracts from Year Book cases bearing upon the subject-matter of his chapters. The Bibliography (pp. 395—406) and an Index of Subjects (pp. 407—415) complete a work which will unquestionably place the learned author among the acknowledged masters of English history during the last century of the Middle Ages.

H. D. H.

Introduzione Storica allo studio del Diritto Romano Giustiniano.

By EMILIO ALBERTARIO, Professore Ordinario nella R. Università di Roma. Parte prima. Milano: Dott. Antonino Giuffrè-Editore. 1935-XIII. viii and 163 pp. (Lire 18.)

JUSTINIAN'S Digest consists, as Justinian himself tells us, of passages from classical jurists, mainly of the second and third centuries of our era, which were selected, cut down and altered where necessary, in view of later legislation, by Tribonian and his colleagues between 530 and 533. So long as the *Corpus Iuris* was binding law, subject to local variations, in most countries of Europe, lawyers were more concerned with its latest form than with its history: the Novels were more glossed than the Code, and classical law was of no consequence to anyone. Renaissance Humanists such as Cujas began to investigate the older law, as a thing worth study for its own sake, and a hundred years ago this study was put on a new footing by the romantic discovery of Gaius. For the first time there was a sizeable nugget of fairly pure gold (the text is not good, but recent attempts to prove free interpolation seem to be forlorn hopes), a touchstone for Tribonian's alloy. Then came the Codes that have relegated the *Corpus Iuris* from the Law Courts, which heed only the law of To-day, to the study, where Yesterday and the Day Before have equal claims on our attention.

For the last fifty years Roman lawyers have been chiefly occupied in disentangling the strands of different times and places interwoven in the Digest, and in this work Albertario has played a great and honourable part. In a long series of able and learned articles he has investigated problem after problem, and there must be hundreds of texts where his analysis is and will always remain unchallengeable. Whether his views

on the history of the Digest are fully accepted or not, there can be no question that he has rendered outstanding service to the study of Roman law.

The work now under review explains, clearly and eloquently, the author's opinions about the origins of the Digest, and sets out with illustrations the many methods by which he claims to distinguish between the doctrines of the classical jurists, of the fifth-century scholars who taught mainly at Beyrout, and of Justinian's compilers. As a critic he is very 'advanced', maintaining that comparatively little of the Digest is truly classical. To the 'conservative' reviewer he seems to put too much confidence in methods which can only be relied on if used with great care and caution.

Three of his criteria—the logical, the logico-juridical, and the exegetic—all depend on a doctrine that is assumed rather than proved or even asserted, namely that the classical jurists were always logical and consistent, always used words exactly and without variations of meaning. Now these are the virtues of nineteenth-century Germans: the reviewer well remembers hearing Dr. Kisch of Munich explain that the language of the B.G.B. is a 'technische Sprache', the same expression always meaning the same thing. They are notoriously and scandalously absent from English law; they are not commonly attributed to Tribonian; but it is seldom recognized that they are conspicuously absent from the MSS. of Gaius. Editors who assume that Gaius must have been exact can make him appear so by the further assumption of glosses and interpolations, but there is no evidence for his exactitude or for that of other classical writers. Most of them were men of affairs, and if we must have *a priori* assumptions it is more reasonable to suppose they contented themselves with making their meaning clear, and did not trouble their heads about niceties of verbal precision. On the exactitude of Gaius, the reader may profitably turn to a recent article by Professor Buckland in the *Juridical Review* (1936, p. 339).

Now the changes postulated by Albertario greatly exceed not only anything the compilers were told to do but also anything they can possibly have done in three years. Hence Albertario and others now maintain that at the end of the fifth century the classical law-books were used in copiously annotated editions, and that notes and text were transferred together to the Digest. No doubt there must have been glossed texts, and collections, with the older Vatican Fragments, of passages from different authors dealing with the same topics. But the evidence for anything on the scale required is flimsy, and there is one strong argument against it. The interpolations are in Latin, whereas all evidence and all probability indicate that the Masters of Beyrout taught and wrote in Greek. This fact Albertario recognizes (p. 111). Professor Buckland draws the moral in the article already mentioned.

There are serious flaws in the foundation, but of the skill with which the learned author builds up his superstructure no praise can be too great. His learning is both wide and deep, but even more remarkable is the fertility of invention which, confronted by a difficulty, can always see half-a-dozen elegant explanations and is embarrassed only by the necessity of choice. If anyone wants to know what game Roman lawyers have been playing for the last half century, and to see it played by a master, let him study Albertario's *Introduzione*.

P. W. D.

The History of Quasi-Contract in English Law. By R. M. JACKSON, M.A., LL.B., Solicitor, Lecturer in Law in the University of Cambridge. Cambridge: University Press. 1936. xxxvi and 134 pp. (10s. 6d. net.)

IN this latest volume of the Cambridge Studies in English Legal History painstaking work and an exhaustive study of the cases have enabled Mr. Jackson to make a notable contribution to our knowledge of the development of quasi-contract. The work is divided into two parts, Part I, 'Before the rise of *indebitatus assumpsit* in the seventeenth century', and Part II, 'From the rise of *indebitatus assumpsit* to the settlement of the main principles'. This arrangement is not ideal, as it involves the reader in a certain amount of dodging about to learn all the author has to say on any given topic: only if there had been a sudden and marked break in the development would this method have been wholly convenient, and there was no such break. But the industry and thoroughness of the author cannot be too highly praised: his investigation of the early authorities has done a great deal to clear the ground for a work on the modern law.

Especially helpful are an illuminating criticism of Langdell's theory of the action of account (p. 32), a clear statement of the rules as to consideration in *indebitatus assumpsit* (pp. 42-5), and the summary of the law relating to recovery of money received under an illegal contract (pp. 115-6).

Two passages in the book may require further consideration in the light of cases decided since it was written. On p. 54, dealing with claims for money paid, the statement that '... the formal basis will not arise by implication of law unless there is a material basis in compulsion coupled with relief of the defendant from some liability', may need qualification in view of *Re Chetwynd's Estate* [1936] 3 All E. R. 254. Here the defendant was not relieved of any liability, since the joint promissory note given by him and the plaintiff to the moneylender was not enforceable owing to non-compliance with requirements of the Moneylenders Act, 1927, as to the memorandum, though neither party was aware of this at the time of the payment by the plaintiff. At p. 88, the statement of the scope of the truly quasi-contractual form of *quantum meruit* seems now too narrow in view of *Craven-Ellis v. Canons, Ltd.* [1936] 2 K. B. 403. Here there was no one who could make a contract on behalf of the company—the persons who purported to act as directors did not hold the necessary qualification—and *quantum meruit* was not merely a rule for assessing damages in an action, even if in all the cases considered by Professor Winfield it can be so regarded.

Mr. Jackson supports the view that account stated is contract and not quasi-contract (p. 110), and in this we can agree with him without necessarily accepting either of his explanations. Surely there may be said to be an implied agreement by each party in consideration of the other's admission of the amount owing and forgoing proceeding in respect of the individual items included in the accounting. This avoids the difficulties inherent in the basing of the contract on the consideration of precedent liability.

In section 30 (pp. 117--124) reference might have been made to the comments of Mr. Henry Cohen in 45 *Harvard Law Review* (1932), p. 1333 ('Change of Position in Quasi-Contracts'), where it is contended (p. 1337)

that the decisions in actions for recovery of payments made under mistake were no more affected by principles of equity than any others made at law after an honest attempt to reach justice—unless it is assumed that Chancery alone aimed at a decision which was ‘equitable’ in the wider sense. Lord Mansfield introduced only a verbal confusion, and the decisions, as distinguished from the language in which they were expressed, would have been much the same without him.

In this section, too, the subject of lunatics’ and infants’ necessities has been rather lightly touched upon. Why the fact that the matter has been put upon a statutory basis should make it ‘no longer of forensic interest’ and unworthy of real consideration is not clear. This would seem to apply with equal force to any historical question in a case in which the law has been changed! But it is the favourable impression produced by the book as a whole which prompts such comment. So much had been found to help with other difficulties that the absence of help on this most difficult topic brought a momentary sense of frustration.

It is a sound and valuable work, warmly to be commended to all students of legal history.

R. H. K.

Salmond's Law of Torts. Ninth edition. By W. T. S. STALLYBRASS, D.C.L., Fellow and Vice-Principal, Brasenose College, Oxford. London: Sweet & Maxwell, Ltd. 1936. lvi and 716 pp. (£1 10s. net.)

It is not often that both author and reviewer can find themselves in complete—nay, joyful—agreement on the necessity for an amendment in the next edition. We congratulate Dr. Stallybrass very warmly on the alteration which has become requisite on the title-page owing to his translation to the Principalship of the College for which he has done so much.

And when that has been said, what other amendments, except verbal or trivial ones, can one suggest for this ninth edition? On several points we should be inclined to differ from the learned editor's interpretation of particular decisions; but that is only another way of saying that case law is constantly developing; that the chief mode of its development is by litigation on differences of interpretation, and that until the Courts have settled the problem one way or the other, a reviewer's chances of being correct are no greater than are those of the author—indeed probably less when the author is Dr. Stallybrass.

The Legislature and the judges, between them, have kept him fairly busy since the last edition. Parliament, with a promptitude none the less welcome because it is so surprising, has tried to give effect to the recommendations of the Law Revision Committee relating to death, married women and joint tortfeasors, and several cases have been decided on the interpretation of the Law Reform Acts of 1934 and 1935. The most notable of these is *Rose v. Ford* [1936] 1 K. B. 90, which is now listed for appeal to the House of Lords. Dr. Stallybrass regards the dissenting judgment of Greer L.J. as correct. We have elsewhere expressed a preference for that of the majority L.J.J., but purely on the interpretation of the Act of

1934 and certainly not without regret that, if this is its correct meaning, the statute scarcely squares with the intentions of the Law Reform Committee. Incidentally, we are sorry to see that Dr. Stallybrass (at p. 363) approves the *dictum* of Parke B. that it is 'impossible to form an estimate of the value of human life'. Why, then, are life insurance policies, leases for life and annuities allowed by the law?

Sect. 34 on Remoteness of Damage has been slightly shortened. We hope that it will not be further abridged, for, although it is rather too long for the student, it is invaluable to both him and the practitioner because we know of no better discussion of principle—or lack of principle—in any text-book, including even the monographs on Damages.

Haynes v. Harwood [1935] 1 K. B. 146 is of course examined. Years ago Sir Frederick Pollock thought that when a case of this sort should come before the Courts, they ought to follow American decisions, which allowed one who had been injured in rescuing A from peril created by B's negligence to recover damages from B; and that was what the Court of Appeal did in *Haynes v. Harwood*, following in effect Professor Goodhart's summary of trans-Atlantic law.

Other major alterations in this edition are two new sections on apology and mitigation of damages in libel, and an expansion of the distinction between libel and slander. On the last topic, as the learned editor indicates, our views about gramophone discs do not coincide; but we should be glad to see the Courts adopt his opinion, for it would break down one of the many artificial barriers between slander and libel. These distinctions were more workable in an era which knew not the gramophone, wireless transmission, the heliograph, and sky-writing by aeroplanes. Now they have become a source of legal puzzles.

At p. 211, the learned editor has, we venture to think rightly, reversed his view in the eighth edition that an accidental entry on land is an actionable trespass. We could never discover any real authority, apart from cattle trespass cases, for this proposition. It was due principally to the reliance placed by some text-books on a *dictum* of Grose J. in *Leame v. Bray* (1803) 3 East 593, 600, which was inaccurate historically and probably an incorrect statement of the law even in 1803.

In the sub-section on deception by the use of a person's own name (pp. 628—631) it would be interesting to have Dr. Stallybrass's opinion on the relation of *Heppels, Ltd. v. Eppels, Ltd.* (1928) 46 R. P. C. 96 to *Cash, Ltd. v. Cash* (1902) 19 R. P. C. 181. We have found it a hard task to reconcile these cases and we suggest that the injunction in *Heppels' Case*, if it is correctly reported, was too wide. At any rate some correspondence with the greatest living authority on this branch of the law fortifies us in this view.

It is worth noting that in the three editions of this book for which Dr. Stallybrass has been responsible he has managed to keep it practically the same size and that, in spite of all the alterations needed since the author's last edition (1924), the current edition is only about fifty pages longer than that was.

P. H. W.

The Law of Damages. By FRANK GAHAN, M.A., B.C.L., LL.B., of the Inner Temple and South-Eastern Circuit, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1936. lxxx and 242 pp. (15s. net.)

THE learned author of this book has had an excellent foundation for its composition in having edited *Mayne on Damages*. When all credit has been allowed to Mayne and to *Arnold on Damages*, there was plenty of room for a completely new work on the topic, and the Preface of this one states that 'the articles and illustrations are intended for the use of students and of those who want a general view of the subject as a whole'. The latter of these objects has been achieved, and achieved admirably. As a concise exposition of principle which will put any practitioner on his inquiry to all the relevant cases (some 2,100 are cited) distributed under the various heads of the law, the book will be in great demand and we shall be surprised if it has not a vista of several editions before it. But we should hesitate to put it in the hands of any student, and if Mr. Gahan will pardon such plain speaking we suggest that either this claim for it should be abandoned in the Preface to the second edition or that the book should be considerably enlarged in its explanation of principles.

We venture to think that the best method of instructing a student is not merely to state a rule but to tell him the reason for it, to point out any serious doubts where they exist and to indicate to him the lines on which these doubts should be resolved. The treatment of *Re Polemis* [1921] 3 K. B. 560 scarcely satisfies this test. The facts are given in eight lines on p. 27 and a note of thirteen lines on p. 101 completes the survey. We are well aware that *Re Polemis*, although it excited a good deal of interest in text-books, has until recently been treated with freezing indifference by practitioners and the Courts; but some day the House of Lords will have to consider it directly and not merely indirectly as in *The Edison* [1933] A. C. 449, and that is why the student needs some detailed instruction upon it. Much more does he need it on the general rules as to remoteness of damage in tort; but, able as is the learned author's statement of the rules relating to particular torts, there is no discussion of the general principles set forth in Article 6 which would give a student some idea of the thicket of difficulties in which the topic is involved. That we should not entirely agree with the contents of Article 6 is a matter of no importance, for the law is in such a dubious plight that it would be a miracle if any two lawyers who have examined it closely could agree in every point upon it.

One or two minor suggestions may be made. At p. 8 the principle of compensation is said to be *restitutio in integrum*, subject to the limitation that the damage must not be too remote. A cross-reference might have been inserted to *Moss v. Christchurch R. D. C.* [1925] 2 K. B. 750, which is mentioned as a qualification of the rule (pp. 117, 120); and this case is somewhat oddly put under the rubric 'Trespass to Land', whereas the report shows that the claim was for negligence or, alternatively, nuisance. The description of nominal damages as 'a mere peg on which to hang costs' (p. 24) is a dangerous expression in view of the discretion to award costs which the modern law of procedure has vested in the Courts. At p. 114 it is said of the rule in *Rylands v. Fletcher* that it 'generally operates to make a defendant liable for consequences for which he would not otherwise be liable'. Presumably 'consequences' means 'injuries',

for otherwise the sentence might imply that remoteness of damage is subject to peculiar rules in liability of the type of *Rylands v. Fletcher*.

P. H. W.

Roman Law and Common Law, a Comparison in Outline. By W. W. BUCKLAND, LL.D., D.C.L., F.B.A., Regius Professor of Civil Law, Fellow of Gonville and Caius College, and ARNOLD D. MCNAIR, LL.D., Whewell Professor of International Law, Fellow of Gonville and Caius College. Cambridge University Press. 1936. viii and 353 pp. (15s. net.)

THE study of Comparative Law, which has long obtained recognition on the Continent, has, until recently, attracted scant attention in England. The appearance of the present work marks an important step in the growing interest in the subject in Cambridge, of which the recent institution of a chair in Comparative Law (but for a single tenure only) has already furnished some proof. As most of the civilized systems of law of the world are more or less remotely derived from Roman Law or from the English Common Law or from an admixture of both, it would seem that a comparative view of their respective rules and institutions, indicating differences and similarities both in the rules and institutions themselves and the mode of their development, is a necessary preliminary to any complete treatment of the subject. No English work, so far as we are aware, has hitherto attempted this task, except in the form of comments or notes in the course of exposition of one or other of the two systems. The present volume will fill, and we need hardly add, having regard to the names on the title page, will fill most adequately, a gap in our legal literature. Although in every part of the work Professor Buckland's hand is easily to be recognized, the collaboration has been so skilfully effected that nowhere is there any serious breach of continuity.

In dealing with so large a field it was inevitable that some statements should be made here and there which are open to criticism. In particular, in stating the present law (as altered by modern legislation) the authors occasionally tend to obscure a basic doctrine of the Common Law by giving undue prominence to what, after all, is exceptional. Thus on p. 68, in dealing with the clause in hire-purchase agreements postponing the vesting of the property until all instalments are paid, they say: 'But even here our law gives a result very different from the Roman Law.' But the result is exceptional and due to statutes promoted by the mercantile community overruling and running counter to the Common Law, as was so lucidly explained by Bowen L.J. in *Sanders v. Maclean*. This is made clear by the authors themselves in the footnote on p. 69. The Common Law rule is, if anything, more strict than in Roman Law, as *Hollins v. Fowler* may show. It may be that in early times the rule *mobilia non habent sequelam* was recognized, at any rate by some local customs. But this did not survive, and its original scope is a much disputed and obscure question (see Pollock and Maitland, *History of English Law*, vol. II, ch. IV). A less important instance of a similar kind is on p. 134, where it is correctly stated that by 'our modern law a will is *ipso facto* revoked by the marriage of the testator' (subject to exceptions to which reference

is made). It should be made clear that the original rule, as regards a man's will, is otherwise. As regards that of a woman the rule was the same, a result due to the view taken by the Common Law of the proprietary rights of the husband. What we have said may appear to be hypercriticism, but we think it important that when a rule is the result of modern legislation overruling the Common Law the doctrine of the Common Law should be made clear and the extent to which it is modified by statute indicated. It would be impossible within the limits of space at our disposal, even were we competent to do it, to make a complete survey of this most interesting treatise. It cannot fail to stimulate a wider study of both legal systems and to break down the isolation which has hitherto been a characteristic of English Law studies.

D. T. O.

A Concise History of the Common Law. By THEODORE F. T. PLUCKNETT, M.A., LL.B., Professor of Legal History in the University of London. Second edition (enlarged and entirely rewritten). London: Butterworth & Co. (Publishers), Ltd. 1936. xxv and 635 pp. (20s. net.)

WE welcome the appearance of this revised edition of Professor Plucknett's work, which has already an established reputation in America. Within the compass of a volume easily handled he has succeeded in presenting a clear and scholarly view of the constitutional history of our system of Judicature and also of the legal machinery and formative influences by which the doctrines of the Common Law have been developed. The first Book, dealing with what may be termed the constitutional aspect of the subject, will furnish a most useful Introduction to the study of English Law, embodying, as it does, in a concise form, the latest results of research. It should be read in conjunction with another work for which Professor Plucknett is also partly responsible, *Readings on the History and System of the Common Law*, by Pound and Plucknett. The second Book, dealing with the development of the Common Law in its main departments together with a concluding chapter on the history of Equity, is concerned with material which will hardly be grasped by students in the earlier stages of their law studies. It furnishes, however, an excellent book of reference to supply the historical knowledge necessary for the understanding of the modern law. The author, although a historian by training, has been able in a remarkable degree to view the subject from the legal standpoint, and has produced a text-book of permanent value to lawyers. Of such parts of the work as we are able from experience to form a judgment, we can testify to the care and accuracy with which it has been composed. It may be desirable to call attention to one point which has caused some discussion. We are not prepared, although we have read Professor Plucknett's article in the *Columbia Law Review*, to assent to his statement on p. 335 that trespass on the case 'has no connexion' with the statute *In Consimili Casu*. We think it probable that it does not originate in that statute, as has hitherto been supposed, but to make its development independent altogether of the statute seems too great a breach with tradition to be maintained.

D. T. O.

A Treatise on the Law of Income Tax. Seventh edition. By His Honour Judge E. M. KONSTAM, K.C. London: Stevens & Sons, Ltd.; Sweet & Maxwell, Ltd.

THIS work has reached a seventh edition within fifteen years from its first publication, an eloquent testimony to its merits.

At first sight, it might appear that this specialist's subject offers little which would be of general or academic interest. It is primarily concerned with the statutes governing the assessment and collection of one of the imposts whereby the State now seeks to finance its ever increasing burdens. The universality of its application—for it may concern the income of companies and individuals of both sexes and all ages derived from business or investment in all parts of the world—has however rendered it inevitable that tax cases involve and illustrate almost all, if not all, the problems of general law.

Income tax was in its origin a war tax devised in 1799 by Pitt the Younger, who is said to have been advised by Adam Smith. Its earliest form did not survive the general settlement following the Battle of Waterloo, but it was reimposed as a temporary tax in 1842, and, though requiring fresh Parliamentary sanction every year, it has remained a source of revenue to the State ever since. The statutes were consolidated in 1918 and a Royal Commission has recently produced a draft Bill intended to restate the statutory provisions in a form more suited to present conditions. The underlying scheme dates from 1842, and indeed from 1799, and the organization and development of industrial and commercial life have been transformed since then. To deal simply with a complex condition is to cause obscurity and even injustice, and an examination of the amendments since 1920 supports the thesis that the tax Acts are not sufficiently detailed, and explains why the draft Bill is far more bulky than the existing legislation.

The effort to be simple and comprehensive has led to bitter complaints as to the drafting of such statutes. The art was transformed by Thring in the nineteenth century, but it is to be feared that the time has arrived for a thorough reform of the system of drafting. Judge Konstam in dealing with the changes introduced by the Finance Act, 1936, says, mildly, 'For intricacy—to use no harsher word—these enactments can hardly be equalled.' It may be doubted whether any living person could give an accurate and satisfactory construction of section 21 of that Act, relating to children's allowances. A person who desires to complain of obscurity in statutes need not go beyond the Appendix to this book. If he has first read the statutes and then turns to the text he will be convinced of the learning and understanding of the author.

The scope of income tax is income, but the term is not defined. The consequence has been that the Courts have been called upon to solve many problems as to capital and income, both as to receipt and as to expenditure. The same or similar problems have arisen in relation to companies and between tenants for life and remaindermen. The principles are the same and the great equity case of *Bouch v. Sproule* (1887) 12 App. Cas. 385 governed the tax decision of *Commissioners of I. R. v. Blott* [1921] 2 A. C. 171, and the wealth of tax cases on this topic has supplemented and extended the equitable and legal rules relating to capital.

There is a great work open to the student who will examine the not always consistent decisions on the question of capital in the light of

modern economic principles. But the above is only one example of the way in which the burden on the taxpayer has caused light to be thrown on problems of general interest. The tax cases can often be used in many contexts which seem remote from their subject. Much learning can be displayed on the principles which we call the doctrine of *Res Judicata*. If the title 'Estoppel' in the second edition of *Halsbury* be consulted (vol. 13, p. 409) the citation of authorities in the notes will be found to be supplied in recent years almost entirely by the tax cases. There is a learned and luminous discussion of the doctrine in the Privy Council judgment delivered by Lord Shaw in *Hoystead v. Taxation Commissioner* [1926] A. C. 155. Then again, the exemption of charitable income from taxation is the reason why the bulk of modern discussions on the nature and constitution of a charity is contained in the tax cases. *Special Commissioners v. Pemsel* [1891] A. C. 531 is the leading case on the subject, and that is but one of the numerous cases whereby the taxpayer has enlightened the equity lawyer in Lincoln's Inn. The method of taxation at the source has led to minute discussions of the nature of an annuity and its distinction from payment of price by instalments. The list can be extended until even the most sceptical will be convinced that a practice in tax cases calls for profound learning in all branches of the law as well as the examination of the conduct of business in all its branches over the whole world and a full appreciation of the social and family organization of this country. The present writer recently found it necessary, in discussing the policy of a company as to its reserve funds, to examine and criticize the housing policy of the Government, as the company's business consisted in the holding of small weekly houses.

Nevertheless the subject-matter of this book, though it concerns the whole community, is primarily the province of specialists. The book is written for them and is used by them with confidence. The latest edition maintains and increases the reputation gained by its predecessors.

Principles of Contract. By the Right Hon. Sir FREDERICK POLLOCK, Bt., K.C., D.C.L. Tenth edition. London: Stevens & Sons, Ltd. 1936. 762 and lxiii pp. (30s.)

THE profession has recently been mourning the death of Sir Frederick Pollock, who in his ninety-second year continued to flourish with unparalleled vigour. Shortly before his death he brought out this new edition of his treatise on contract which, sixty years after its first publication, entered upon its tenth edition. Though preceded by nine years by the first edition of *Leake on Contract*, it has been since 1876, and now still remains, an indispensable text-book for the intelligent student of that branch of the law.

This is not the place to record the work of Sir Frederick; but it is fitting to remember that he was perhaps as learned in the law of England as ever man has been, and that he combined his prodigious learning with a versatility of talent which did not disdain the composition of verse in languages modern as well as ancient and which without apparent effort, in the midst of legal avocations, produced an excellent treatise on Spinoza. When, in addition to the long-standing success of his work on contract,

account is had of the extraordinary eminence of the author, it may well appear not only superfluous but impertinent for a reviewer to attempt any detailed criticism of the tenth edition.

The tenth edition remains what the book (as its sub-title reveals) always proposed to be, namely 'a treatise on the general principles concerning the *validity* of agreements in the law of England', and not, as is sometimes erroneously supposed, an account of the law of contract in general. Accordingly 'injunction' does not figure in the Index and *Hadley v. Baxendale* is absent from the list of cases. On the other hand the topics which are considered are treated in fuller detail and with more system and learning than they have received in any English text-book which is not merely a monograph on a selected subject. They were, and are, a contribution to the scientific development of the English law of contract which might well, by themselves, have established the reputation of any lesser man than Sir Frederick.

The Preface states that 'no great novelty will be found' in the new edition; and attention is specifically called only to a section of the first chapter (pp. 47—51) as being wholly re-written. That section, entitled 'Acceptance of conditions annexed by reference', is mainly concerned with the recent ticket cases and contains the views which Sir Frederick published in vol. 50 of the *Law Quarterly Review* of January 1934.

A careful collation of the list of cases in the ninth and tenth editions shows that in the tenth there are included one hundred and fifty-seven new cases which for the most part represent Sir Frederick's selection from the cases decided between 1921 (the date of the ninth edition) and 1936. Yet a comparison of some of those parts of the book where the new cases have been inserted reveals but slight variations in the text, with the exceptions (so far as I have discovered them) of the section on wagers (pp. 334—339) and of a discussion of *Bell v. Lever Bros., Ltd.*, as to which Sir Frederick 'ventures to hope that in the next generation our successors will put it on the shelf as one of those decisions on peculiar facts in which it is unsafe to put one's trust as settling any general principle'.

No doubt the principles of the validity of contracts have not altered much in the last fifteen years; and the almost negligible extent of the variations in the text is a tribute to the soundness of Sir Frederick's original views, which indeed have been an important factor in shaping the course of the law. Nevertheless the reader is left with the impression that he has lost the full benefit of the author's fresh opinion upon those topics which since the war have most come to the forefront; and he will more feelingly appreciate the magnitude of that loss when he again peruses Sir Frederick's existing text with an increasing admiration of the author's judgment and wisdom.

C. J. H.

Records of the Vice-Admiralty Court of Rhode Island, 1716—1752. Edited by DOROTHY S. TOWLE. With an Introduction by CHARLES M. ANDREWS. Washington, D.C.: The American Historical Association. 1936. 595 pp.

THIRD of the publications known as *American Legal Records*, which are edited for the American Historical Association, this volume, devoted to

the colonial Vice-Admiralty Courts, admirably sustains the high standard of scholarship established by the earlier volumes. It is a valuable contribution to our knowledge of an important aspect of American legal history. In bringing us this information it also illumines features of political, economic and social history in the colonies prior to the Revolution; and at the same time it throws light on vital points of English history in the seventeenth and eighteenth centuries. In brief, the volume draws to our attention, and stresses, the importance of the Vice-Admiralty Courts as one of the historical foundations of the American Union.

The Introduction entitled 'Vice-Admiralty Courts in the Colonies' (pp. 1—79), by Professor Andrews, is a learned essay on a part of colonial history which has been, hitherto, much neglected by writers. Professor Andrews shows us the close historical relations, and also the differences, between the English and the colonial Courts of Admiralty. He emphasizes the point that the eighteenth-century Vice-Admiralty Courts in the colonies, with their civil law procedure, not only reached 'a sort of amicable understanding' with the colonial Courts of common law, but 'exercised a jurisdiction that in dignity, scope, and influence surpassed the same jurisdiction in England and gave to the American Admiralty its peculiarly varied and vigorous character' (p. 2). The jurisdiction of these eighteenth-century Courts in both Continental and insular America embraced ordinary marine causes, such as seamen's and masters' wages, bottomry, charterparties, contracts for building, furnishing and freighting ships, claims for money lent or advanced, collisions, salvage, wrecks, whales and other drift fish, and frauds on the revenue; but of all these causes suits for wages and salvage were by far the most common (p. 24). The jurisdiction included prize cases, which accounted for more than a third of all the causes heard by the Courts between 1702 and 1763 (p. 41); and belonging to the jurisdiction were also cases arising out of breaches of the acts of trade and of treaty arrangements as well as trials for interloping (p. 24). Professor Andrews' essay is a lucid exposition of this varied and extensive jurisdiction.

Professor Andrews' study of vice-admiralty jurisdiction in the American colonial world, including the West Indies, prepares the way for Mrs. Towle's scholarly essay, far too brief, on 'The Rhode Island Vice-Admiralty Court', wherein she gives an account of the constitution, procedure and jurisdiction of that tribunal in the eighteenth century (pp. 81—98). For the Rhode Island cases, which are presented with much skill and learning (pp. 101—575), Mrs. Towle, while using the minute books as a nucleus, has reconstructed the text from the file papers. In accomplishing this laborious task she has been obliged, through lack of space, to eliminate a large part of the available material; and she has made her selection of documents with two chief ends in view, namely, to show the procedure of the Court and to present the oral evidence upon which the decree was based (p. 98). Upon these matters, as well as other topics of legal interest, this collection of cases is a treasury of reliable information.

The volume includes a list of the places where the unprinted sources for the history and procedure of the Vice-Admiralty Courts in the colonies are to be found (pp. 99—100), an appendix of forms (pp. 561—575), a table of cases (pp. 579—582) and an index of names and of subject-matters (pp. 583—595). The index of names mentions both persons and ships.

H. D. H.

Das Recht des Warenverkaufs. By ERNST RABEL, Director of the Kaiser-Wilhelm Institut für ausländisches Privatrecht. Berlin and Leipzig: Walter de Gruyter & Co. 1936. La. 8vo. xxxii and 533 pp.

DR. RABEL'S treatise on the law of sale is beyond doubt a work of the first importance in the domain of comparative commercial law. It represents the fruits of many years of careful and patient investigation and stands alone as an exposition of the various forms which the law of the sale of goods has assumed in all parts of the civilized world. Dr. Rabel's knowledge of his subject is encyclopædic and one is amazed by the profundity of his learning and by the skill with which he has arranged a mass of complicated and conflicting statute law. His book is built up round the provisions of the draft International Law of Sale which was compiled by a committee of the Rome Institute for the Unification of Private Law during the years 1930—1933. Dr. Rabel was a prominent and active member of this committee which included representatives of the Germanic, Latin, Scandinavian and Anglo-American systems of law. The draft law is at the moment in the hands of the Economic Section of the League of Nations and there is a strong probability that, when the international situation improves, the draft will be submitted to a conference similar to that which approved the Geneva Uniform Laws of Negotiable Instruments in 1930 and 1931. This alone gives to the volume under review an importance which few legal text-books are destined to achieve. But it is also a scientific work of great distinction. The learned author has analysed the constituent elements of all the principal codes which deal with the law of sale of goods and has probed deeply into the problem of a reconciliation between widely differing principles. He points out, with justice, that the variations which are to be found in the law of contractual obligations throughout the world are seldom fundamental in character because the purpose of the rules is almost always identical, though the goal aimed at may be reached by different methods. He is, perhaps, over optimistic as to the ultimate prospects of unification but there can be no doubt that the work of the Rome Committee has blazed a trail which opens up the way to future international action. In particular, one may agree with him that the solution found by the Rome Committee for the problem of the seller's liability for defects in the goods is one which possesses many advantages over the corresponding rules which now apply in the various jurisdictions. For instance, although it is largely modelled on the rules of sections 13 to 15 of the Sale of Goods Act of 1893 it avoids the artificial distinction between 'conditions' and 'warranties' and clears up many of the difficulties of interpretation which have been responsible of late for so much litigation in our Courts.

Dr. Rabel is to be congratulated on his masterly achievement in the realm of applied comparative law or, more properly speaking, in the sphere of the comparative method of legal research. His book will furnish a model for those who come after him.

H. C. G.

Outlines of Constitutional Law. By DALZELL CHALMERS, B.A., and the Hon. CYRIL ASQUITH, M.A. Fifth edition by CYRIL ASQUITH, K.C. xxxi and 510 pp. London: Sweet & Maxwell, Ltd. 1936. (15s.)

THE Preface to this new edition begins with the disarming remark that 'This manual has never claimed any virtue beyond practical utility'. Little attempt is made to explain the way in which our constitution works; the aim of the editor has apparently been to pack as much information as possible into one volume. Regarded as a lesser reference book, and it is difficult to see how a student can use it as his main text-book, it has many defects. Repetitions are perhaps difficult to avoid, but it is confusing to find that the composition of the House of Lords in its appellate capacity is wrongly stated at p. 44, and correctly given at p. 71 and again at p. 283. Cross-references would save much trouble, as in the collective responsibility of the Cabinet where p. 35 is qualified by p. 212. The handling of the Petition of Right and *Hampden's Case* at p. 108 will appear strange to students who use *Keir and Lawson's Cases* (a work to which the editor does not refer). At p. 184 it is said that 'The Crown cannot be a trustee' (except for the Public Trustee), although at p. 185 the *Civilian War Claimants Assoc. Case* (1931) 48 T. L. R. 83 is cited, where Lord Atkin saw no objection to the Crown acting as agent or trustee. At p. 306 the jurisdiction of county courts in tort and contract is wrongly stated. There are other inaccuracies. The part played by prerogative writs in modern constitutional law is inadequately treated. Two cases of such general interest as *Elias v. Pasmore* [1934] 2 K. B. 164 and *Duncan v. Jones* [1936] 1 K. B. 218 are not even mentioned. The reviewer remembers that police forces are mentioned somewhere in the book, and thinks that very little is given about them, but he is unable to check this because the Index contains no entry under 'police' or anything else that might give a clue.

R. M. J.

Goodeve's Modern Law of Personal Property. Eighth edition. Revised and partly re-written. By HAROLD POTTER, Ph.D., LL.B., Dean of the Faculty of Laws at King's College, London, and A. K. KIRALFY, LL.M., Assistant in Laws at King's College, London. London: Sweet & Maxwell, Ltd. 1937. lxxi and 759 pp. (22s. 6d. net.)

PERSONAL property was once described, by Professor Winfield, as a 'rag-bag of odds and ends'. This book in the hands of Dr. Oliver, the editor of the sixth and seventh editions, better than any other gathered up the ends and lessened for the reader the oddity of the bag's contents. The new editors had a high standard to maintain, and they have performed their task creditably, although there is now some inconsistency in style. In this respect the editions prepared by Dr. Oliver were ideal for a text-book—concise, but clear and always grammatical. The new parts of the work for which Dr. Potter is responsible tend to be less, and those of Mr. Kiralfy more, concise than this ideal.

The principal changes are the addition of a useful introductory chapter on 'Interests in Personalty', a fuller treatment of Copyright, and the inclusion of a section on motor accident insurance and, in the chapter on Executions, of sections on county courts and foreign judgments. Throughout there are minor alterations and new law has been efficiently incorporated.

There are some errors and omissions, but they are not numerous. The editors' plea that the work was hurried as a result of the seventh edition going out of print is to some extent an excuse for slips, though the plea is deprived of some of its force by the interval of five months between the date of the Preface, presumably written after preparation of the manuscript, and publication.

On p. 16 it is said that 'Any interest which is to take effect after an interest invalid for perpetuity is itself invalid.' This is only so where the subsequent limitation depends or is expectant upon the prior limitation: *Re Canning's W. T.* [1936] Ch. 309. It is implied (p. 96) that the only form of *bona vacantia* is under section 46 of the Administration of Estates Act, 1925, under an intestacy. This of course is not so. Section 296 of the Companies Act, 1929, is not mentioned here or in the chapter on Companies.

In the Bankruptcy chapter references have been added to the recent cases on section 40 of the Act of 1914 (executions), but no attempt is made to explain their effect (p. 562). Later, in dealing with section 39 (second bankruptcy), no mention is made of *Re Coombes* (1935) 51 T. L. R. 258, to the effect that proof cannot be made in the second bankruptcy for debts provable but not proved in the first bankruptcy (p. 569).

There is still no reference to *Burnham v. Atlantic, etc. Co.* [1928] Ch. 836 (p. 597: acknowledgment under Civil Procedure Act, 1833), although the omission was pointed out in a review of the last edition.

These are, however, only points of detail and, considering the book as a whole, the work of renovation has been well done, and *Goodeve* remains the best students' book on the subject of Personal Property.

R. H. K.

Russell on Crime. Ninth edition. By ROBERT ERNEST ROSS, of the Middle Temple, Barrister-at-Law. London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1936. Two vols. cviii and 1598 pp. (£5.)

THE present edition of this well-known work admits a change in that the law relating to pleading, evidence, and procedure generally is not included. There is, however, no change in the method of presentation of the subject, for although it is stated that the volumes are not intended to be a book of practice yet they certainly remain a handbook for practitioners. From this point of view *Russell on Crime* has maintained itself for many years as an exhaustive collection of material so arranged as to enable an experienced reader rapidly to find the decisions and cases that are likely to be most useful to him. There has been no break in the tradition that a work of this character should concern itself very little with jurisprudential theory. In a total of some 1,600 pages in the two volumes only fifty are devoted to an exposition of general principles. The

distinction between felonies and misdemeanours, the test of indictability in cases of breach of statute, and the interpretation of statutes take up sixteen of these, so that there is little space left for the discussion of the general principles of criminal responsibility. Thus infancy, insanity, drunkenness, compulsion, ignorance, and mistake are all dealt with in thirty-four pages of which the greater part is devoted to an outline of the facts and quotations from judgments of decided cases with little critical analysis. According to the index, *mens rea* is discussed only in one place (p. 45) where it is alluded to and disposed of in eighteen lines. It is therefore not surprising to find that such cases as *Manley* (of which the date is wrongly given as 1924), *Maughan* (wrongly spelt 'Maugham') and *Woolmington* are most cursorily treated as though they have given lawyers nothing very much to think about. Nor are there any references to the published literature on the problems to which these and similar cases have given rise. In such books as this counsel confronted with a novel problem of law can find cases in plenty but not so much help in the understanding of the principles by which the cases can be distinguished and a true *ratio decidendi* suggested to the Court. In spite of these limitations, however, *Russell on Crime* remains a most valuable book for the practitioner and for the advanced student. It might well be given the title of a digest of the substantive law of crime, for we know of no other work which comprises so large an amount of information on this branch of our law presented in a form so convenient.

J. W. C. T.

Harris and Wilshire's Criminal Law. Sixteenth edition. By A. M. WILSHERE, M.A., LL.B., of Gray's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1936. lii and 730 pp. (15s.)

THREE years' development of criminal law has added thirty pages in the latest edition of this book. The reader will find all the most important of recent cases referred to, and a clear account of the legislation affecting criminal law which has been effected since 1933. The general scheme of the book has not been altered and therefore the observations with reference to the last edition which appeared in the review in this journal in 1933 apply equally to this one. It is a book which may be confidently recommended to students, for they will find it a thoroughly reliable guide for their investigations into the practical aspect of the subject which they are attempting to master.

J. W. C. T.

Crime and Justice. By SHELDON GLUECK, Professor of Criminology, Harvard Law School. Boston: Little, Brown & Co. 1936. 349 pp. (\$3.)

THIS book is intended primarily for laymen, but for the benefit of those who take a professional interest in criminology detailed notes on the text are supplied in an appendix. Professor Glueck begins with a general

survey of the background of crime in America, showing the peculiar difficulties in the maintenance of law and order when a huge country has been exploited at such speed that the growth of material wealth and mechanical power has outrun the capacity of a population of mixed origins to develop a cultural control of the forces which have been thus created. He then criticizes the existing machinery for the prevention of crime and the apprehension, trial and treatment of offenders. After a chapter on the delinquents themselves some constructive proposals are made for the improvement of a state of affairs which in his view is profoundly unsatisfactory. The author deals with the problems of America, but cruelties and abuses of the sort which he exposes exist and must always exist in any country where no real effort is officially made to discover and remove the causes of crime and where punishment is inflicted without due regard to its operation in reforming and rehabilitating the offender—in short, where the science of criminology is neglected. This is therefore a book which can be read with profit by anyone who desires to eliminate anti-social conduct in his own country.

J. W. C. T.

The British Year Book of International Law, 1936. Seventeenth Year of Issue. Humphrey Milford, Oxford University Press. 260 pp. (16s.)

THESE are depressing days for those who have believed in International Law as a developing world force moving towards the establishment of peace and goodwill between the peoples of all nations. Not all, however, have lost their faith or weakened in their devotion, as can be seen from the latest number of the British Year Book which sturdily maintains the established standard of this now famous publication. There is no doubt that the vast majority of normal people in all countries desire to live in peace under a rule of universal law. This is indeed recognized by those who dislike such a prospect: for the most brutal of them still keep up a pretence, however transparent it be, of legality in their violations of the law and spare no effort to distort the mentality of the masses over whom they rule. And though we may feel disgusted by the hypocrisy of others who pretend to believe that such violations have not taken place and who, while uttering high-sounding phrases in support of international justice, are prepared to work secretly with the law breakers, the important fact remains that they find the hypocrisy necessary in order to delude the ordinary man. It is upon the ordinary man that the fate and future of International Law depend, and the recognition of this fact forms the kernel of Professor McNair's article on Collective Security in the present issue. The importance of the individual man and the dangerous futility of arguments based on the attribution of a real existence to the mere abstract notion called 'the State' can be gathered also from the article on Monism and Dualism by Mr. J. G. Starke. It is, however, not enough that the plain man of each nation should mean well—he must also be sufficiently sagacious to detect who are the enemies of his ideals. This is fairly easy when he looks abroad, but the task is more difficult and much more necessary when he turns his eyes towards his own country. Professor H. A. Smith contributes an interesting discussion of the use

of aircraft in war in the exercise of the right of Visit and Search, Mr. Fitzmaurice gives an exhaustive analysis of the case of the *I'm Alone*, while the Protection of Vested Rights is dealt with by Dr. Kaeckenbeeck. Mr. Fachiri extracts from the very complicated matter of the Finnish Ships Arbitration clear statements of the Local Remedies Rule, and the claims of the Covenant to be regarded as a 'Higher Law', by virtue particularly of Article 20, are supported by Dr. Lauterpacht. Sir John Fischer Williams emphasizes the importance of even an attempt made to enforce obedience to the Covenant by the application of Sanctions. Some points of Private International Law are dealt with incidentally in some of the articles and it receives its share of special attention in a discussion of the Gold Clause by Mr. B. A. Wortley. There is the usual valuable collection of notes, decisions and reviews of books.

J. W. C. T.

The Penal Law of India. Fifth edition. By Sir H. S. GOUR. Nagpur: The Central Book Depot. (£1 10s.)

THE Indian Penal Code was passed in 1860—a general codification of criminal law—and has been amended from time to time as required. It is legislation that has been highly and justly praised—used in many other countries than India—and has been the model on which criminal codes for many colonies have been drafted. This book, explaining the Code, is large; so large that one wonders, as it takes nearly two thousand pages to explain it, how many volumes would be required to explain the criminal law of England and its complexities. Perhaps the points are too carefully explained; the book is like a very elaborate course of lectures in print.

Space was wasted in praising a work that needs no praise; but we should mention that the sections on attempts; intrusion upon privacy; intention; negligence; and *mens rea* generally are very well done. There is an explanation of *mens rea* which may be equally applicable to English criminal law, and is worthy of study by many people.

It is an interesting contrast to local prices that a book of this excellence can be sold for thirty shillings.

H. B.

Sutton and Shannon on Contracts. Second edition. By RALPH SUTTON, M.A., K.C., and N. P. SHANNON, of Gray's Inn, Barrister-at-Law. London: Butterworth & Co. (Publishers), Ltd. 1937. lxx and 389 pp. (12s. 6d.)

THIS work is one of the most popular of student's text-books on the law of contract. We note in the Preface that the review of the previous edition in volume 5 of this journal at pp. 288-9 has proved useful, and the learned editors have given effect to most of the suggestions made therein. The book is well brought up to date; some seven new statutes are dealt with; about fifty additional cases have been incorporated, of which twenty were decided since the appearance of the last edition, and

some of the older cases have been omitted. The portions dealing with section 40 of the Law of Property Act, 1925, at pp. 95—101, and section 4 of the Sale of Goods Act, 1893, at pp. 103—107, have been entirely rewritten and considerably enlarged, and will certainly be found very helpful. One or two slips occur in the Table of Cases; e.g. *Warlow v. Harrison* is not at p. 22, *Prested Miners Co. v. Gardner, Ltd.* is at p. 107 and not p. 98, and the reference to *Lee v. Griffin* should be p. 105. We have sampled numerous sections, and congratulate the editors upon making the work still more useful to the student.

Constitutional Law of the United States. By HUGH EVANDER WILLIS, Professor of Law, Indiana University. Bloomington, Indiana: The Principia Press. 1936. viii and 1198 pp. (\$10.)

THIS book merits a lengthy appreciation. Here it can only receive a brief review notice. The author adopts the functional approach to his subject, though the chapter titles retain the usual nomenclature based upon constitutional doctrine. The Preface states that 'it is realized that the United States Supreme Court is the one great instrumentality responsible for the creation of new social interests, and, when it is necessary to balance various social interests, for the determination of whether one social interest is of more importance than another social interest'. These words sound strange to lawyers on this side of the Atlantic, accustomed to regard the nine Old Men of Washington as chiefly concerned with the unconstitutionality of changes in the Constitution. Yet, here is a lawyer writing for lawyers who regards the Constitution as a progressive document. Lord Haldane perhaps would have saved the Canadian social legislation lately declared void by the Judicial Committee of the Privy Council, but it is hardly the tradition of that tribunal to approach its task of declaring upon the validity of constitutional issues in the spirit of the quotation given above.

As we follow the author through his thirty-two chapters we note that only one-third are directly concerned with the dual form of government, while no less than thirteen are entitled 'Personal Liberty and Social Control', concluding with 'Capitalism, the United States Constitution and the Supreme Court'.

We commend this book as a scholarly treatise which must be the fruit of many years' labour. We may criticise federalism as a form of government, but not for the first time has it produced a valuable study of law as a social instrument.

E. C. S. W.

The Cambridge History of the British Empire. Vol. VIII. South Africa, Rhodesia, and The Protectorates. Cambridge University Press. 1936. xxv and 1005 pp. (42s. net.)

THIS handsome volume contains the most complete history of South Africa in all its aspects which has yet appeared. Readers of this journal

will naturally turn in the first place to the chapter on Roman-Dutch Law (Chapter XXXI) which has been contributed by the Hon. Mr. Justice Watermeyer of the Supreme Court of the Cape. Into the short space of fifteen pages the learned judge has compressed an admirably lucid account of the introduction and development of the Roman-Dutch system in South Africa, which will satisfy the general reader and will serve as a useful introduction to students who wish to make South African law a special subject of study. In aiming at conciseness, however, there is a danger of falling into inaccuracy. There is an instance of this on p. 842, where the writer states that in intestate succession 'representation is unlimited'. It would also perhaps have been as well if in the same connexion he had made some reference to the Union Succession Act of 1934, which goes some way to remedy an injustice often caused by the old law of intestacy to a surviving spouse.

But quite apart from the legal section the volume will be found of the greatest value in setting forth political and economical developments, a knowledge of which should form part of the equipment of every lawyer.

D. T. O.

The Jurisprudence of Holland by Hugo Grotius. The text translated with brief notes and a commentary by R. W. LEE, D.C.L., Rhodes Professor of Roman-Dutch Law, Fellow of All Souls College, Oxford, Docteur (honoris causa) de l'Université de Lyon, Vice-Président de l'Académie Internationale de Droit Comparé. Vol. II, Commentary.

THE first volume published in 1926 contained the text with a translation; the publication of this second volume, containing the commentary, represents a noteworthy achievement. In a Preface the author states that the work is intended for the use of practical lawyers, who may know the value of an apt citation from Grotius, but who cannot undertake the labour of reading and mastering the vast amount of print and manuscript which bridges the gulf between the law of Grotius and that of the present day.

This is the task which Professor Lee has set himself, his method being to indicate the sources from which Grotius' material was derived, and, by reference to subsequent commentators and to statutes and judicial decisions, to show what changes in the law have been brought about in the past three hundred years. He has succeeded in bringing within a reasonable compass nearly all that is of value.

There is in this volume fare to appeal to all those interested in the science of the law, but more particularly will a study of it repay the Scots lawyer, for there is much in common between the two systems. The Dutch writers on Roman Law have in the past been constantly cited in Scotland, and even to-day such citation is not infrequent. As Professor Lee points out, Scots Law in details approaches the Roman-Dutch Law more nearly than do any of the European systems.

D. I. C. A.-C.

Lord Mansfield. By C. H. S. FIFOOT, Fellow of Hertford College. Oxford: Clarendon Press. 1936. 250 pp. (15s.)

ENGLISH legal history is so vast that even when its apparatus is more complete than it is at present it will not be possible to expect students to add to their vocational training more than an acquaintance with some of its outstanding features. Among these the career of Lord Mansfield will for a long time to come retain a place. It is remarkable that hitherto there have been so inadequate facilities for studying it. Mr. Fifoot has made a notable addition to them in writing this book. It would be ungrateful to complain of faults which could have been cured only by spending a great deal more time upon it, and so delaying publication for many years. Even as it is the author's task must have been a very laborious one, as the references show.

The plan of the book is excellent. The main substance of it is contained in four chapters, covering 150 pages, and appropriately described by the headings *Reforms in Procedure, Commercial Law, Contract and Quasi-Contract, and Lord Mansfield and the Conveyancers*. At the beginning is a biographical chapter of twenty-five pages, and at the end two chapters of a more general character (fifty pages) entitled *Principle and Precedent, and Epilogue*. The biographical chapter might well be expanded in the next edition.

I do not think that any teacher of legal history, or indeed of law, can afford to be without this book. It will be regretted by those who are not the fortunate possessors of reviewers' copies that it should be so expensive. If it had been cheaper students would have been tempted to buy it.

Mr. Fifoot's mastery of epigram is apparent. The question whether he has allowed it to become over-dominant is one of taste, and it would be presumptuous of a Cambridge reviewer to attach any importance to his own.

H. A. H.

Prideaux's Precedents in Conveyancing. Twenty-third edition.

By R. M. C. MUNRO and Sir L. H. ELPHINSTONE, formerly Chief Justice of the Federated Malay States, both of Lincoln's Inn. In three volumes. (£6 6s.)

VOLUME II of this hardy perennial was published last year by Stevens & Sons and The Solicitors' Law Stationery Society, Ltd. It contains nearly 1,200 pages. Readers of this journal will be primarily interested in the several introductions, amounting in all to nearly 250 pages. These have been almost entirely re-written, embodying references to the latest decisions. The main topics covered are Leases, Mortgages, Bills of Sale, Powers of Attorney and Patents. Lecturers on these topics are advised not to neglect *Prideaux* when searching among other authorities for some point which eludes them.

An Introduction to the Principles of Land Law. By A. D. HARGREAVES, Solicitor, Reader in Law at the University of Birmingham. London: Sweet & Maxwell, Ltd. 1936. 243 pp. (12s. 6d.)

MR. HARGREAVES is one of the ablest graduates of the Cambridge Law School of the post-war period and his book deserves a cordial welcome there. It is intended for beginners, and very wisely aims, not at giving them in small compass the minimum of the knowledge necessary for an examination in real property law, but at providing an introduction to the larger books.

He has wisely used the historical approach, laying emphasis upon features which, previously to Dr. Radcliffe's notable book, were apt to be ignored, but are essential for the understanding of the modern system.

The following suggestions may be useful. First, there is too much 'we' in the book. So many law books are disfigured by the frequency of phrases such as 'we may now ask the reader to accept', 'we hasten to add', 'we may now turn to', 'we need not pause to consider'. If when preparing a second edition Mr. Hargreaves will go through the text ruthlessly eliminating all such superfluous phrases his style will be greatly improved.

Secondly, whenever quoting in inverted commas he should quote *verbatim*, especially when quoting Maitland. The expression 'flirtation with Roman Law', on p. 62, is an inaccurate truncation of Maitland's arresting phrase.

Thirdly, if the price of this book were reduced from 12s. 6d. to 10s., the text being shortened if necessary, the sales would in my opinion be doubled.

H. A. H.

The Cambridge Ancient History. Vol. XI, The Imperial Peace, A.D. 70—192. Edited by S. A. Cook, Litt.D., F.B.A., F. E. ADCOCK, M.A., F.B.A., M. P. Charlesworth, M.A. Cambridge: At the University Press. 1936. xxvii and 997 pp. (35s.)

THE great enterprise entitled *The Cambridge Ancient History* is approaching its completion. The eleventh volume, which just falls short of a thousand pages, covers the 120 years from the end of the Civil War to the death of Commodus. It is a period in which the historical evidence is beginning to fail, though, as Mr. Sandbach reminds us in the seventeenth chapter, there was a sort of renaissance of Greek literature in the second century. It is also the period which marks the rise of Christianity, and the delicate and intriguing task of describing this without betraying dogmatic bias has been intrusted to the Provost of The Queen's College. Dr. Streeter writes (p. 265): 'It would be absurd to attempt, in a subsection of a single chapter, to give an outline of the life of Jesus, to present in systematic form his teaching, to relate it rightly to that of the Rabbis or Apocalyptists, to portray his character, or to appraise the significance of his person for religion.' Instead, he gives us the newest

theories of the Apostolic and sub-apostolic literature, and a most interesting analysis of the seven types of psychology to which, for quite different reasons, the new religion made appeal. Hadrian and the Antonines are described by Professor Weber of Berlin, who concludes his two chapters with a novel estimate of Commodus, which seems to show the influence of contemporary German political views. Of special interest to English readers are the sections dealing with the final conquest in Britain by Agricola, and the organization of the Province as revealed by the most recent archaeological work. Cambridge contributes four writers—Mr. Charlesworth (The Flavian Dynasty), Mr. Sandbach (Greek Literature, Philosophy and Science), Mr. Sikes (Latin Literature of the Silver Age) and 'last, but not least', Professor Buckland, who concludes the volume with a chapter on Classical Roman Law. This chapter, surveying the ground already fully explored in his Text-Book of Roman Law with an additional section on Criminal Law, will be of special interest to the readers of the *Cambridge Law Journal*.

C. F. A.

Topham's Real Property. Eighth edition. By ALFRED F. TOPHAM, LL.M., Reader in the Law of Real Property and Conveyancing to the Council of Legal Education. London: Butterworth & Co. (Publishers), Ltd. 1936. xxxviii and 448 pp. (15s. net.)

MR. TOPHAM'S work has long been established in the affections of students as a lucid and well-arranged exposition of this difficult branch of our law. In the edition following the legislation of 1925, the method was adopted of stating the old law and new law separately and thus indicating the changes effected by a comparative view. This arrangement has now been abandoned and the book becomes, as originally, a systematic exposition of the principles of real property law. In aiming at conciseness of statement the author has occasionally sacrificed accuracy and the confusion between the notions of 'tenure' and 'estate' (see the table on p. 16) which appeared in the earlier editions is still to be noted in the present edition.

D. T. O.

Modern Conveyancing. By A. McDougall, M.A., B.C.L., of the Inner Temple, Barrister-at-Law, Lecturer in Law at the Victoria University of Manchester. London: Sir Isaac Pitman & Sons, Ltd. 1936. xxviii and 273 pp. (15s. net.)

THIS book is an introduction to the study and practice of conveyancing for students who have already studied real property. A thorough perusal of the work has failed to reveal any defect and, having regard to its scope, any omission of substance. The first seven chapters deal with the sale of land, and the remainder with leases, mortgages, settlements, wills and assents, and registered land. Its main characteristics are precision and clarity, a judicious selection of topics and authorities—it supplies what

every beginner wants, a clear explanation. Epitomes of abstracts of title, forms and precedents are discussed and explained in detail, and there are sound practical hints on the preparation and perusal of abstracts and the drafting of requisitions. Every chapter has a sound practical touch, and the author is to be congratulated upon a work of real merit which will be an invaluable guide to beginners. At p. 193, n. (3), the reference to L. P. A. s. 29 should be s. 24.

T. E. L.

Ringwood's Principles of Bankruptcy Law. Seventeenth edition.

By ALMA ROPER, of the Middle Temple, Barrister-at-Law.
London: Sweet & Maxwell, Ltd. 1936. lii and 683 pp.
(22s. 6d.)

In the present edition the text occupies 321 pages. Appendix I containing the Bankruptcy Act, 1914, and the Bankruptcy Rules as amended to date, forms, scales of costs, Board of Trade Regulations, excerpts from statutes, etc. covers 251 pages, and Appendix II dealing with the Deeds of Arrangement Act, 1914, as subsequently amended, its rules and forms, occupies thirty-seven pages. A comprehensive index covers seventy-three pages. Seven new statutes appear since the last edition in 1930, and numerous recent cases are referred to; among others we note *Blakey v. Pendlebury* (1931), *Latham v. Goldbury* (1933) (reputed owner and debt growing due), *Re Garret* (1930) (personal earnings). The chapter on the Bills of Sale Acts is now omitted. The edition is certainly comprehensive and complete; the author is to be warmly congratulated on making it more valuable than ever to the student, and the practitioner can refer to it with confidence.

T. E. L.

The Law of Libel and Slander. By W. VALENTINE BALL, O.B.E., M.A., a Master of the Supreme Court. Second edition. By the AUTHOR and PATRICK BROWNE, M.A., of the Inner Temple, Barrister-at-Law. London: Stevens & Sons, Ltd. 1936. xxxv and 229 pp. (10s. net.)

THIS book which first appeared in 1912 was founded on a series of lectures delivered at the Institute of Journalists. In the second edition further provision has been made for the requirements of the lawyer, but not at the expense of the journalist who need run no risk if he abides by this edition. On questions of defamation, pleading is of paramount importance, and here the author is a veritable master. The new edition appears at a time when there is a widespread feeling that the law of libel requires modification and amendment, and although the learned authors refrain from expressing their private opinion, their penetrating analysis of numerous cases makes it clear that all is not well in this intricate branch of law. The work is entirely up to date and every recent case of importance is incorporated. *Sim v. Stretch* (1936) and *Yousoupoff v.*

Metro-Goldwyn-Mayer Pictures, Ltd. (1934) are carefully analysed at pp. 3—7 in arriving at a clear understanding of the term defamation. The entire field is dealt with in a scholarly and accurate manner. Perhaps a reference to the *Law Quarterly Review*, vol. LI, pp. 282, 573-4, might have been made on the problems raised at p. 8. At pp. 186—193 there is an admirable summary of the law of contempt of Court. We have read the book with profit and with interest; we know of no better guide to this important but difficult branch of law.

T. E. L.

Statut International de l'U.R.S.S. Etat Commerçant. By A. STOUNNITZKY. Paris: Librairie Générale de Droit et de Jurisprudence. 1936. 486 pp. (50 francs.)

IN all countries there is now some measure of State control of commerce and industry, and control is apt to shade off into active participation. State-owned and operated shipping and State monopolies in commerce create peculiar problems. For the U.S.S.R. it is an essential part of the political system that the State has a monopoly of all export and import trade. To understand the situation it is necessary to consider both the internal organization of part of Soviet economy and the repercussions of this upon other countries. The economic life of the U.S.S.R. is organized internally upon lines that are superficially similar to those of other countries; corporations and co-operatives for production, corporations that handle transport, and banks that finance transactions, all have their place. Hence in commercial dealings with the U.S.S.R. questions may arise such as, Who is the party to the transaction: is it the Soviet State or some corporation within the State? A further set of complications arises from the fact that some States have given *de iure* recognition to the Soviet régime and others have not. Both conflict of laws and international law are involved. M. Stounnitzky has tackled these problems with lucidity and skill; it is not his fault that more questions are raised than can be answered satisfactorily. The author's general conclusion is that the relations that have arisen can only be put on a sound juridical basis by some modification of Soviet formal institutions and some review of certain traditional ideas of international law. Good bibliographies are provided, but the table of contents at the end is not a good substitute for an index.

R. M. J.

Gibson's Practice of the Courts. Sixteenth edition. By ARTHUR WELDON, Solicitor, and ROBERT LEE MOSSE, a Master of the Supreme Court. London: The 'Law Notes' Publishing Offices. 1936. xxxvi and 299 pp. (£1 1s.)

THE work under review has reached its sixteenth edition and belongs to that select circle of books which have found a well-established and well-deserved place on the shelves of every student of the Law Society and of every practising solicitor. A 'Law Notes' publication has the hallmark

of accuracy; this edition is up to date in every way, and the treatment and arrangement of subject-matter are eminently practical. The editors have incorporated in the text about a dozen new cases, and all the relevant statutes and rules. Among the statutes we note the Arbitration Act, the Administration of Justice (Appeals) Act, the Law Reform (Miscellaneous Provisions) Act of 1934, the Supreme Court of Judicature (Amendment) Act, the Law Reform (Married Women and Tortfeasors) Act of 1935 and the County Courts Act of 1934, which became operative this year. The work is a clear and concise exposition of an intricate branch of law which is constantly undergoing changes. The index and annotation are as reliable as the text of this admirable book.

T. E. L.

Conveyancing Land Registry and Probate and Administration Costs. Second edition. By A. GEO. CALTON. London: Stevens & Sons. 1936. 144 pp. (7s. 6d.)

THIS is a very handy and complete guide to costs, with explanatory notes and precedents on the Solicitors' Remuneration Act, 1881, as amended by General Orders down to 1936. The tables of scale costs are comprehensive; without any doubt it will simplify the task of the solicitor in preparing his bill.

A Digest of the Law of Evidence. By the late Sir JAMES FITZ-JAMES STEPHEN, Bart., K.C.S.I., D.C.L., one of the Judges of the High Court of Justice. Twelfth edition. By Sir HARRY LUSHINGTON STEPHEN, Bart., of the Inner Temple, Barrister-at-Law, and LEWIS FREDERICK STURGE, of the Inner Temple, Barrister-at-Law. London: Macmillan & Co., Ltd. 1936. lvi and 273 pp. (7s. 6d.)

THIS has long been an extremely useful handbook for students and in its twelfth edition it needs no commendation from a reviewer. In form and arrangement the book remains the same, but it has been thoroughly revised. Some seven new statutes have been incorporated, about twenty-four recent cases, and a number of older authorities. There is no omission of importance. There is a new appendix on legal relevance in its relation to the theory of logic, and the Notes to the Articles have been considerably enlarged and brought up to date.

Pitman's Commercial Law. By J. A. SLATER, B.A., LL.B. Eleventh edition. By R. H. CODE HOLLAND, B.A., of the Middle Temple, Barrister-at-Law. London: Sir Isaac Pitman & Sons, Ltd. 1936. xii and 282 pp. (3s. 6d.)

THE merit and popularity of this manual are evidenced by its eleven editions in thirty years. It is a handy guide to students of commercial

law preparing for the various accountancy and secretarial examinations. It covers the whole field of commercial law, and the leading principles are clearly and succinctly stated. It is accurate and well revised; about eighty cases, and an almost equal number of statutes, are dealt with in the text, and there is a good index.

Annual Survey of English Law, 1935. London: Published for the London School of Economics and Political Science by Sweet & Maxwell, Ltd. 1936. xxxiii and 355 pp. (10s. 6d.)

THIS number, like its predecessors, is invaluable; it is an accurate and, for its size, a comprehensive summary of the statutes, case-law and legal literature of 1935. The year contributed heavily to public law, but few important decisions on private law. The sections on Constitutional and Administrative Law occupy over sixty pages, ten of which are devoted to an admirable summary of the long and complex Government of India Act. The first two cases on the Statute of Westminster—*British Coal Corporation v. The King* and *Moore v. Att.-Gen. for the Irish Free State*—are given the prominence they deserve. Under Administrative Law we have *Errington v. Minister of Health*, among others, on 'quasi-judicial' functions of administrative authorities, and the highly important decisions of *Thomas v. Sawkins* and *Duncan v. Jones* on police powers in relation to public meetings. In Property and Conveyancing we find *Waring v. London and Manchester Assurance Co.* (mortgagee's power of sale), *Re Sigsworth* (intestacy and public policy), *Elliot v. Joicey* (posthumous child) and a number of copyright cases. Contract contributes *Doyle v. White City Stadium, Ltd.* (infancy), *McEvoy v. Belfast Banking Co.* (privity of contract—freedom from the shackles of consideration), and two cases on public policy. The section on Tort is of outstanding merit and the notes on *Grant v. Australian Knitting Mills*, *Rose v. Ford* are an invaluable contribution. In Mercantile Law insurance cases are prominent, and in Industrial Law there is a mass of delegated legislation and cases on workmen's compensation. In the section on Criminal Law there appear the highly important cases of *Cotterill v. Penn (mens rea)*, *Woolmington v. Director of Public Prosecutions* (burden of proof) and the two on public meetings and police powers. A hope is expressed in which we all join, at p. 277, that an attempt will be made to recast the Rules of the Supreme Court in simple unambiguous English. The year was not important for Conflict of Laws. Public International Law covers forty pages dealing with book reviews and international conventions. Every section is admirably done.

T. E. L.

The Book of English Law. By EDWARD JENKS, D.C.L. Fourth, revised, edition. John Murray. 436 pp. (12s.)

THIS book, in its earlier edition, was fully reviewed in this journal: it deserves the praise it has received, for it is a difficult task to describe

'the framework and principles of the whole of English law, in language intelligible to the educated layman, as well as to the law student'. The present edition is corrected down to the end of 1935. Perhaps in the next edition more information might be given about 'costs'. The Bibliography (which is a guide for those who wish to read more widely) might be revised, particularly in Constitutional Law, where the works of Dr. Wade and Dr. Jennings should be mentioned.

The Forms of Action at Common Law. By F. W. MAITLAND.
 Edited by A. H. CHAYTOR and W. J. WHITTAKER. Cambridge University Press. 92 pp. (4s.)

MAITLAND's *Forms of Action* previously published in a volume called *Equity* is now reprinted as a separate volume at a very modest price. This is still the best introduction to the study of common law actions. A revised and annotated edition might be of still greater value to students.

Maitland Selected Essays. Edited by H. D. HAZELTINE, G. LAPSLEY, and P. H. WINFIELD. Cambridge University Press. 256 pp. (12s. 6d.)

THIS volume consists of part of Maitland's introduction to *Memoranda de Parlamento* and six papers, *The Corporation Sole*, *The Crown as Corporation*, *The Unincorporate Body*, *Trust and Corporation*, *Moral Personality and Legal Personality*, and *The Body Politic*. They have been selected as being likely to be useful to students in law, history and politics. The editing has been confined to footnotes, a method well suited to these particular essays. Mr. Lapsley contributes an exceedingly good introductory note to *Memoranda de Parlamento*. The essays have stood the test of time and need no more than mention in this journal: the editing is a fine example of that difficult process.

Student's Introduction to Conveyancing. By E. MILNER HOLLAND, B.C.L., M.A., of the Inner Temple, Barrister-at-Law. London: Butterworth & Co., Ltd. 1936. xx and 231 pp. (12s. 6d.)

THIS is a very good little book within its self-imposed limits, which are those implied by a strict construction of the title.

It is good in that it is clearly written and, more important, it is also clearly conceived. The conception moreover is that of a practitioner, to the benefit of the reader who learns details generally passed over, such as an explanation of the term 'office copy'. The author, writing in 1936, has been able to ignore comparisons suggested by the property legislation of 1925 and has throughout adopted a non-historical approach. In effect,

the book is not primarily concerned with law, whether past or present, but with draftsmanship, and simple precedents are given which illustrate the text.

Of course such a distinction involves gaps, which are, I think, particularly noticeable in the chapter on Wills. There no place is given to the law against perpetuities. Admittedly the author assumes a certain knowledge of legal principles, but the rule against perpetuities is a practical consideration for the draftsman, not merely a point of pure law for the lecture-room. The passages dealing with Abstracts of Title also seem a little thin, because too much of the necessary law is assumed to have been gathered elsewhere.

The general get-up of the book and the paragraphing contribute to make this an acceptable introduction to conveyancing, which students would be well advised to buy.

P. H. D.

Fraser on Libel and Slander (Law and Practice). Seventh edition. By G. O. SLADE, M.A., of the Middle Temple, Barrister-at-Law, and NEVILLE FAULKS, M.A., LL.B., of the Inner Temple, Barrister-at-Law. London: Butterworth & Co., Ltd. 1936. lxi and 371 pp. (35s.)

THIS edition of *Fraser* has been excellently done by the editors, who by the careful and accurate way in which much new material has been incorporated have added considerably to the value of the book both to practitioners and students. As far as can be seen no recent case has been omitted, and such cases as *Tolley v. Fry* [1931] A. C. 333, *Chapman v. Ellesmere* [1932] 2 K. B. 431 and the *Yousoupoff Case* (1934) 50 T. L. R. 581 have been adequately treated. The arrangement of the book has been planned from the point of view of the practitioner and in Part IV will be found a useful collection of precedents followed by an Appendix containing a collection of the more important statutes, including the Law Reform (Married Women and Tortfeasors) Act, 1935, which, as the editor points out in the Preface, has had an important effect in this branch of the law. There is a small mistake at p. 334 which from the heading to the precedent given for the form of Indictment appears to suggest that Criminal Libel is triable at quarter sessions. This edition is well worthy of the high standard set by its predecessors and can be highly recommended.

P. H. D.

Law of Damages. By C. T. McCORMICK, Professor of Law, Northwestern University. St. Paul, Minn.: West Publishing Co. 1935. xiv and 811 pp.

THIS long book on the American Law of Damages can only be of limited use to English lawyers, except for comparative purposes. There are very few references to English cases and indeed very little space has been

devoted to many subjects which are of importance in our system, notably Remoteness of Damage or Proximate Cause: the reader will search in vain for any mention of the *Polemis Case* [1921] 3 K. B. 560, *Smith v. L. & S. W. Ry.* (1870) L. R. 6 C. P. 70, *Weld-Blundell v. Stevens* [1920] A. C. 956 and even *Palsgraf v. Long Island R. R.* (1928) 248 N. Y. 339. The book appears to be a full account of much American case-law and to have been written more for the practitioner than for the student. Within the limitations indicated, which however seriously impair its value to English lawyers, it appears to be well arranged and accurate.

P. H. D.

The Law of Civil Salvage. By the late Lord Justice KENNEDY. Third edition by His Honour Judge A. R. KENNEDY. London: Stevens & Sons, Ltd. 1936. xxxv and 303 pp. (15s.)

A NEW edition of this classic treatise on Salvage was badly needed and the learned editor has fulfilled this need with great care and skill. The decisions since the last edition have been numerous and important and as far as can be seen they are all to be found in the present edition. In particular, mention should be made of the careful treatment which *The Melanie (Owners) v. The San Onofre (Owners)* [1925] A. C. 246, *Bradley v. Newsum* [1919] A. C. 16, *The Goulandris* [1927] P. 182 and the cases during the Great War have received, which is typical of the excellence of the whole book. *Kennedy* has for a long time been indispensable in the consideration of any question of Salvage and this recent edition, which brings the law up to date, enhances its high reputation.

P. H. D.

Gibson's Probate and Divorce. Twelfth edition. By ARTHUR WELDON, H. G. RIVINGTON, and L. C. WARMINGTON. London: The 'Law Notes' Publishing Offices. 1935. xcviii and 352 pp. (£1 1s. net.)

THE twelfth edition of this well-known book will be welcomed by practitioners of both branches of the profession and also by students, who will find the principles and practice of these branches of the law clearly and concisely set out in its pages. The Probate section, to which little addition has been made, contains an admirable chapter on Estate Duties, while a useful feature of the Divorce section is the reference to matrimonial proceedings in Courts of summary jurisdiction. A valuable addition to any further edition of this work would be a selection of forms and precedents for the practitioner's general use. Students will continue to find this book of invaluable assistance to them in obtaining a clear and concise view of these complicated branches of the law.

Questions on Mercantile Law with Notes of Answers. By W. J. WESTON, M.A., B.Sc., of Gray's Inn, Barrister-at-Law. London: Sir Isaac Pitman & Sons, Ltd. 1936. vii and 94 pp. (2s. 6d.)

THIS book is a companion volume to *Slater's Mercantile Law* and contains questions upon nine different branches of Commercial Law. Like many books of its type the answers given must in many cases be taken with the reservation that only the very simplest propositions can be included in so small a space. To rely entirely upon the answers as exhaustive would be dangerous, but if the book as a whole is taken as a framework of cases on which some of the leading principles of the law are based, it may prove of value as a quick method of arriving at some decision upon those points to readers who do not require an accurate and full knowledge of the law that is applicable.

Craies. A Treatise on Statute Law. Fourth edition. By WALTER S. SCOTT, K.C., LL.D. London: Sweet & Maxwell, Ltd. 1936. lv and 568 pp. (37s. 6d.)

IT is a tradition of English legal education that little, if any, attention is paid to Statute Law, yet the subject of interpretation of statutes grows yearly more important. *Craies* is, of course, much more than a bare recital of rules and precedents of interpretation; and it is a matter of congratulation that the task of editing the new edition has been undertaken by a member of the Bar, both in England and a Dominion, who on the one hand is a firm believer in the principle of *Heydon's Case* (see specially 109 ff. and 118 ff.) and has made full use of material available in such publications as the *Law Quarterly Review* and the *Harvard Law Review*, and on the other hand is fully alive to the difficulties of interpretation of modern federal constitutions.

The author has enlarged, in chapter 8, the treatment of Federal and Provincial legislative powers. He has made some interesting additions on the effects of legislation of the Colonies (chapter 9). Brief mention is made in an Appendix of the Report of the Committee on Ministers' powers, but more might have been said in chapter 3 on the subject of regulations by administrative Departments in view of the increased importance of this branch of law to-day.

We have heard of students whose first task upon going into Chambers has been to digest the 1,000 odd pages of a large practitioner's text-book; we should prefer to prescribe a study of the somewhat less bulky volume of *Craies*.

E. C. S. W.

Compulsory Acquisition of Land and Compensation. By R. A. GORDON, M.A., LL.M., K.C. Second edition. London: Stevens & Sons, Ltd. 1936. xx and 367 pp. (12s. 6d.)

A WEALTH of legislation bearing directly upon this important subject has been enacted since the first edition of this work appeared in 1925; and the author need make no apology for a second edition. We venture to make the criticism that the earlier chapters take a little too much for granted. It would have been better to have stated in the introduction the object of the Acquisition of Land Act, 1919, as has been done with the Land Clauses Act, 1845; and again, to have said on p. 19 for what purposes a Town Planning Authority can purchase land by compulsion. The subject-matter is necessarily highly technical, and a book of this character ought not to assume previous knowledge of its subject-matter.

E. C. S. W.

The Student's Law Dictionary. Sixth edition. By G. R. HUGHES, B.A. (Oxon), Barrister-at-Law. London: Stevens & Sons, Ltd. 1936. vii and 344 pp. (8s.)

THIS is a Pocket Law Lexicon under a new title. A useful feature is the list of Law Reports of the United Kingdom, and the usual abbreviations. The description of terms used in property law is reasonably detailed and goes further than mere definition. A curious omission is any reference to 'acts of State'.

E. C. S. W.

Equity. A Course of Lectures. By F. W. MAITLAND. Edited by A. H. CHAYTOR and W. J. WHITTAKER. Revised by J. BRUNYATE, M.A., formerly Fellow of Trinity College, Cambridge, and of Gray's Inn, Barrister-at-Law. Cambridge University Press. 1936. xxiv and 343 pp. (15s. net.)

THIS work, like much of the late Professor Maitland's other work, has become part of the stock-in-trade of the Cambridge Law School. As an introduction to the study of the principles of Equity it has no superior, and Mr. Brunyate has wisely decided to leave the text as it stood with the exception of the omission of some obsolete matter. The effect of the legislation of 1925 and decisions consequent thereon has been lucidly and concisely stated in a series of notes, with the aid of which the student will be able to obtain a clear grasp of the present-day operation of equitable doctrines. Mr. Brunyate has executed a difficult task with great skill and accuracy.

D. T. O.

Diplomatic Correspondence of the United States. Inter-American Affairs, 1831—1860. Vol. VII, Great Britain. Selected and arranged by WILLIAM R. MANNING, Ph.D. Carnegie Endowment for International Peace. xxxi and 785 pp. (\$5.)

COMMUNICATIONS from Great Britain occupy twice as much space in this volume as communications to Great Britain, the former including reports from the U.S. Minister in London to the Secretary of State. For this reason the volume is of particular interest to the British historian, who will find here a contemporary foreign view of Palmerstonian diplomacy.

The territorial and other disputes arising out of the proposal for an inter-oceanic canal through Nicaraguan territory and the Clayton-Bulwer treaty are of predominant interest in this period. But there are many subsidiary themes. The economic interests of Great Britain in the suppression of slavery, the status of native Indian tribes, the rights conferred by discovery in international law and the chance declined by Prussia of acquiring California from Mexico are a random selection. Further enumeration is rendered unnecessary by an excellent index.

B. E. K.

Collective Security. Edited by MAURICE BOURQUIN. Paris: International Institute of Intellectual Co-operation. 1936. xi and 514 pp. (16s.)

THE seventh and eighth International Studies Conferences, organized by the International Institute of Intellectual Co-operation in 1934 and 1935, were devoted to the study of Collective Security. This volume is a record of memoranda submitted to the Conference and of the discussions which took place. Institutions of fourteen nations, including Italy, were represented by publicists and jurists of the highest rank, and if the discussions were not always conducted with scientific objectivity, they were at least frank and outspoken. The result is a most useful collection of representative opinions and arguments. The study of 'Peaceful Change', without which its deliberations on Collective Security would be incomplete, will occupy the Conference due to be held this year.

B. E. K.

Cabinet Government. By W. IVOR JENNINGS, M.A., LL.D., Reader in English Law in the University of London; of Gray's Inn, Barrister-at-Law. Cambridge University Press. 1936. xii and 484 pp. (21s. net.)

THIS is the most valuable account of the evolution of Cabinet Government and of the relations *inter se* of the various organs of central government that has appeared in recent years. The book was sent, and

accepted for review, to an authority on the subject, but has been returned with an expression of regret that owing to pressure of work the review cannot be completed in time for the present issue of the *Cambridge Law Journal*. We hope to make it the subject of a special article in the next issue.

Saggi intorno allo Stato. By GIORGIO DEL VECCHIO. Rome: Società Editrice del Foro Italiano. 1935. 8vo. 239 pp.

IN this volume Professor Del Vecchio has brought together a number of articles written by him at different times on the topic of the relations between Law and the State. The essay on the 'Statuality of Law' which has been published in an English translation in the *Journal of Comparative Legislation* (Vol. XIX (1937), p. 1) gives an indication of the trend of the author's line of thought. Professor Del Vecchio's contributions to legal philosophy have attracted wide attention and this is particularly true of his views as to the nature of law.

H. C. G.

Kodifiziertes Internationales Kriegsrecht. By ERNST LODEMANN. Berlin: Georg Stilke. 1937. 8vo. viii and 292 pp. (RM. 10.)

THIS volume contains the texts of such of the various international conventions relating to the law of war as have been ratified by the German Reich. Its value to English lawyers is somewhat curtailed in consequence. No mention is made, for instance, of the Washington Convention of 1922 or of the rules as to aerial warfare which were drawn up at The Hague in 1922 and 1923. But Dr. Lodemann's book serves a useful purpose in so far as it delimits the sphere in which the codified law of war would apply to hostilities in which the forces of the German Reich may be engaged.

H. C. G.

Other books and publications received (some of these will be reviewed in the next issue):—

Burnett's Elements of Conveyancing (with Precedents), being a sixth edition of Deane and Burnett's Elements of Conveyancing. By J. F. R. BURNETT, of Gray's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1937. 501 pp. (21s. net.)

The Gold Clause. Vol. II. New Decisions. Second edition. By A. PLESCH, Dr. Jur. London: Stevens & Sons, Ltd. 1936. 106 pp. (7s. 6d. net.)

Zoning. By EDWARD M. BASSETT. New York: Russell Sage Foundation. 1936. 275 pp. (\$3.)

Historical and Comparative Notes on the First Origin of Specific Performance. By DR. M. G. DE ROSSI. Edinburgh: W. Green & Son. 1936. 20 pp.

Commercial Arbitration under British Law. By J. E. JAMES, LL.B. Paris: International Headquarters, 38 Cours Albert 1^{er}. 31 pp. (9d.)

Trusts on the Continent of Europe. By F. WEISER, Dr. Jur., of Gray's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1936. 103 pp. (7s. 6d. net.)

Aids to Justinian. By JAMES BURNET, M.A., LL.B. London: Stevens & Sons, Ltd. 1936. 43 pp. (2s. 6d. net.)

Handbook of Cambridge Law School, 1936—1937. Cambridge University Press. 1936. 156 pp. (2s. 6d.)

Chicago Bar Record, April-May 1936, November 1936, January 1937. Chicago Bar Association.

Alternative Method to Impeachment for Trial of Inferior Federal Judges. Speech of HON. W. G. MCADOO of California in the Senate of the United States, April 23, 1936.

The Art of Law and other Essays. By J. C. H. LOW, Dean of Soochow University Law School. Shanghai: The Commercial Press. 1936. 221 pp.

The Basis of Japanese Foreign Policy. By A. E. HINDMARSH. Harvard University Press. 1936. 264 pp. (10s. 6d. net.)

La Clause 'Dollar-or'. La non-application de la législation américaine aux emprunts internationaux. By MARTIN DOMKE. Second edition, revised and corrected. Paris: Les Éditions Internationales Rue des Ecoles. 1935. 105 pp. (20 fr.)

University of Toronto Law Journal. Vol. I, No. 2, 1936. (\$2.50 per annum.) The leading articles of interest to us are 'Judicial Interpretation of the Canadian Constitution', by V. C. MACDONALD; 'Administrative Law and the Interpretation of Statutes', by J. A. CORY; 'Separation of Powers: A Study of Administrative Law', by J. FINKELMAN.

The Bell Yard. Journal of the Law Society's School of Law. Solicitors' Law Stationery Society, Ltd. (2s.) No. 17, May 1936: 'Functional Analysis of the Law Relating to Restraint of Trade', by P. J. KAPLAN; 'Legal Education in Canada', by PROFESSOR F. C. AULD; 'Trusts in Favour of Creditors', by DR. H. G. HANBURY; 'Betting and Lotteries Act, 1934: Its Effect on Sweepstakes', by C. F. SCHOOLBRED. No. 18, November 1936: 'Restrictive Covenants', by the Principal, DR. RADCLIFFE; 'Broadcasting and the Law', by R. JARDINE BROWN and

E. C. ROBINS; 'The Problem in *Rose v. Ford* and Comparative Law', by DR. P. WEIDENBAUM.

How to Become a Solicitor. By GIBSON and WELDON. Fifth edition. London: 'Law Notes' Publishing Offices. 1937. 106 pp. (2s. 6d.) A complete guide as to the steps to be taken to qualify, the expense and all other matters of importance to those embarking on a solicitor's career, and thoroughly up to date.

The Arbitration Journal. Vol. I, No. 1, 1937. A new quarterly published by the American Arbitration Association, the Chamber of Commerce of the State of New York and the Inter-American Commercial Arbitration Commission. New York: 521 Fifth Avenue. (\$2.50 per annum.) Its object is the organization of the knowledge of the theory and principles of arbitration, both American and international.

Legislative Loss Distribution in Negligence Actions. By CHARLES O. GREGORY, Associate Professor of Law in the University of Chicago. Published by University of Chicago Press, U.S.A., and the Cambridge University Press, England. 1936. xiii and 200 pp. (9s.) This is a thesis for the reform of the common law doctrines of negligence, for example contributory negligence and the doctrine of last clear chance; and a system is suggested based on principles of 'comparative negligence and contribution between tortfeasors, combined so as to produce an ideal spread of loss among all the parties materially connected with the accident out of which the litigation has arisen'.

Practice at the Irish Bar. A Reading delivered before the Honourable Society of the Middle Temple. By MR. SERJEANT SULLIVAN, K.C. Michaelmas, 1936. London: Sir Isaac Pitman & Sons. 20 pp. (1s.)

The New Commonwealth Quarterly. A Review devoted to research into problems of international justice and security. Vol. I, No. 2, July—September, 1935. London: Constable & Co., Ltd. (2s.)

The Law. By RT. HON. SIR HENRY SLESSER. London: Longmans, Green & Co. (English Heritage Series.) xix and 192 pp. (3s. 6d.)

Law Relating to Shops. By H. SAMUELS, M.A., of the Middle Temple, Barrister-at-Law. London: Pitman & Sons, Ltd. 1937. xiv and 130 pp. (7s. 6d.) This book deals in well-arranged chapters with the various statutes, twenty in number, and about one hundred judicial decisions relating to shops and employment in shops. It should prove of great value to the practitioner.

Georgetown Law Journal. Washington, D.C. Georgetown Law Journal Association. Vol. XXV, No. 1, November, 1936. The twenty-fifth anniversary volume is dedicated to the founder, HUGH J. FEGAN, M.A., LL.D., Secretary and Assistant Dean. The leading articles of interest to us are 'From Rule to Discretion', by J. R. PENNOCK, dealing with Supreme Court Decisions on Constitutional Law and their present trend; 'Contents of a Course on Statutory Law', by F. P. LEE and J. O'BRIEN; No. 3, March, 1936, 'Development of French and German Law', by F. DEÁK

and M. RHEINSTEIN; No. 4, May, 1936, 'Roger Brooke Taney, Chief Justice of the Supreme Court, and his influence on Constitutional Law', by W. L. RANSOM and E. BORCHARD; Vol. XXV, No. 2, January, 1937, 'Law Teaching and Pragmatism', by C. C. WHEATON.

Current Legal Thought. Vol. II, No. 11. New York. 1936. This number is an index to about 110 legal periodicals from August, 1935, to July, 1936.

Tulane Law Review. Vol. X, No. 3, April, 1936. 'The Constitution and Social Progress', by LL. K. GARRISON; '"Contract" Jurisdiction in Admiralty', by G. H. ROBINSON; No. 4, June, 1936, 'The Check Collection Muddle', by H. G. McMAHON.

The College Law Journal (Nagpur University). Vol. III, No. 2. 1936. (1s.)

Revista Del Colegio de Abogados de Buenos Aires. Vol. XV, No. 2. 1936.

Zeitschrift der Akademie für Deutsches Recht. March and July, 1936. Berlin: Akademie für Deutsches Recht. 69 and 71 pp.

The Mar Case, 1866 to 1885, and after. By H. A. DOUBLEDAY. Reprinted from Vol. IX of *The Complete Peerage*. London: St. Catherine Press. 1936. (7s. 6d. net.)

International Law. By K. R. R. SASTRY. With a Foreword by PROF. J. W. GARNER. Allahabad Law Journal Press. 1937. (7s. 6d.)

Problemas Constitucionales. Par A. G. GONZALEZ. Tomo I. La Propiedad y el Impuesto. Madrid: Published by the Author. 1936. xxvii and 279 pp. (6 pesetas.)

Conflict of Criminal Laws. By EDWARD S. STIMSON, Assistant Professor of Law, Washington University. Chicago: The Foundation Press, Inc. 1936. xi and 219 pp.

The University of Toronto Law Journal. Vol. II, No. 1. Lent Term, 1937. Published by the University of Toronto Press. Price, \$2.50 the volume; \$1.50 the number. Articles of especial interest to English readers are 'Two Cases on Damages: The Edison and the Arpad', by PROFESSOR A. L. GOODHART; 'Courts of Record and Sir Edward Coke', by S. E. THORNE; and 'The American Institute's Restatement of Trusts', by DR. H. G. HANBURY.

Schuld und Unrecht. Von DR. FRITZ SCHREIER, Privat-dozent an der Universität Wien. Verlag Rudolf M. Rohrer, Brünn, Prag, Leipzig, Wien. 1935. viii and 171 pp.

Revue Trimestrielle de Droit Civil. Fondateur: A. Esmein. Extrait Faute et Tort. Par FRITZ SCHREIER, Privat-docent à l'Université de Vienne. Librairie du Recueil Sirey, 22 Rue Soufflot, Paris. 1936.

Negligence, Contributory Negligence and Damage Sustained by a Third Party. Tasmania: Printed at 'The Examiner' Office, 71—75 Paterson Street, Launceston. 109 pp. This anonymous, undated and unpriced polemic came to our hands by the courtesy of a colleague. It was not submitted for review, but we notice it as of importance to any one interested in the problem of 'identification' in tortious negligence.

Law and Economics. GIORGIO DEL VECCHIO. Reprinted from Journal of Social Philosophy. Vol. I, No. 4, July 1936.

Ricordando Alberico Gentili. Con un saggio di Bibliografia gentiliana. GIORGIO DEL VECCHIO. Roma: Istituto Italiano di Diritto Internazionale. 1936—XIV. 40 pp.
